UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 23 Cr. 134 (VSB)

CALVIN DARDEN, JR.,

Conference

Defendant.

----------x

New York, N.Y.
September 12, 2024
1:30 p.m.

Before:

HON. VERNON S. BRODERICK,

U.S. District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: KEVIN MEAD
WILLIAM KINDER
BRANDON THOMPSON
STEPHEN J. RITCHIN
Assistant United States Attorneys

XAVIER R. DONALDSON
Attorney for Defendant

ANTHONY L. RICCO
Attorney for Defendant

STEVEN LEGON
Attorney for Defendant

Also Present:

Alexander Ross, Paralegal Specialist USAO

THE COURT: Okay. If counsel could please identify themselves for the record.

MR. MEAD: Good afternoon, your Honor. A.U.S.A. Kevin Mead appearing for the government, joined at counsel table by, in order, William Kinder, Brandon Thompson, Stephen Ritchin, and Alexander Ross.

THE COURT: Okay. And for the defense.

MR. DONALDSON: Your Honor, for Mr. Darden, Xavier Donaldson, standing to my left, of course.

Introduce yourself.

MR. RICCO: Anthony Ricco. Good afternoon, your Honor.

THE COURT: All right. Good afternoon.

MR. LEGON: And Steven Legon, your Honor, good afternoon.

THE COURT: All right good.

MR. DONALDSON: And, of course, Mr. Darden is present.

THE COURT: Yes.

THE DEFENDANT: Good afternoon your Honor.

THE COURT: Good afternoon, Mr. Darden.

You may be seated.

MR. DONALDSON: Thank you.

THE COURT: The matter is on for final pretrial conference. We're scheduled to start jury selection on Tuesday a.m. and just so the parties are aware, in order to accommodate

the attorneys and staff we're going to be -- and so that we're not cramped, we're going to be in Courtroom 110 and we'll do jury selection in 110 and the trial will be conducted in Courtroom 110. And so with regard -- I know -- I think Ms. Disla has communicated with regard to tech run-through, it the tech run-through will be down in 110.

And just in terms of logistics in terms of jury selection, you know, there is, on the Court's website under my name there is rules for jury selection, but, basically, I intend to have 12 jurors and two alternates. And so we will -- Ms. Disla will initially call out 32 names, folks we'll fit as many folks as we can, there's more space down in 110, so we'll fit more people in the box and then in the first row of the courtroom, in the gallery, we'll fill out the rest of the 32. I will then -- and I'll provide instructions. I'll have preliminary instructions for the jury, for all of the prospective jurors indicating -- describing the process. With regard to juror No. 1, prospective juror No. 1, that juror will be asked all of the voir dire questions, and the other jurors will be instructed to follow along, they'll have typically it's a pencil or a pen to mark the questions to which they would answer yes.

So you may have noticed the questions are designed so that if there are no answers, we're not going to follow up. And that's why some of questions, the wording is a little

strange, but that's designed -- by design so that it's only with regard to yes answers.

So if a juror is excused for cause they will -- Ms. Disla will then call out another name and that, whatever prospective juror whose name is called, will take the seat that the juror who has been relieved for cause, where that juror had been sitting. Once we go through and all the questions have been asked and I hear from the parties with regard to anywhere -- if they believe that certain people should be struck for cause, we'll then go through the second round of questions with the biographical information, and then the strikes, we'll have the strikes, where we will the defense will have ten and the government will have six, and then one each on the alternates.

So, first with regard to that, are there any questions with regard to the jury selection? From the government?

MR. MEAD: No, your Honor.

THE COURT: From the defense?

MR. DONALDSON: No, Judge. Thank you.

THE COURT: Okay. All right. Thank you.

Obviously, if anything does come up, you should feel free to raise that. Now, I know we had sent the voir dire questions we proposed to ask the jurors to counsel earlier. Let me ask, have the folks from the government had an opportunity to review it?

And then I'll turn to the defense.

MR. MEAD: Yes, your Honor.

THE COURT: All right. And the defense, Mr. Donaldson?

MR. DONALDSON: Yes. We have received them. And, yes, we have had the opportunity to review them.

THE COURT: Okay. So, first, let's -- well, have you -- I assume, since there was -- the time was so tight you haven't had time to consult with one another about any potential requests, so I'll just --

Yes, Mr. Donaldson?

MR. DONALDSON: I'm sorry?

THE COURT: No. I was just going to ask. So I would just hear from each of the parties if there's anything, additional questions you believe should be added or things, modifications to the questions as they currently stand.

Yes, from the government, Mr. Mead?

MR. MEAD: Very minor things, your Honor. On question No. 7.

THE COURT: 7.

MR. MEAD: The length of the trial, I think we should just make it clear for the jury that the trial will start on the following Monday, so the jury understands from the timing perspective.

On page 3, your Honor, Mr. Legon is not on the list of

attorneys for the defense. I assume he'll be present at the trial, although if that's wrong --

MR. LEGON: Yes.

THE COURT: Okay. So page 3, we will add Mr. --

Let me ask, Mr. Donaldson, will Ms. Reed be attending?

MR. DONALDSON: Yes. She will be attending.

THE COURT: Okay. We can just add Mr. Legon.

MR. DONALDSON: Judge, while we're talking about that, one second, let me make sure I'm clear on this. Hold on one second.

THE COURT: I'm sorry. Could you repeat that?

MR. DONALDSON: Just one second, Judge. I think we need to add our intern-paralegal as well, Justin Lebrun as well.

THE COURT: Justin Lebrun?

MR. DONALDSON: L-E-B-R-U-N.

THE COURT: So J-U-S-T-I-N?

MR. DONALDSON: That's correct.

THE COURT: L-E-B-R-U-N.

MR. DONALDSON: Yes.

THE COURT: Okay. And I'm sorry, what title?

MR. DONALDSON: Paralegal.

THE COURT: Paralegal. And any additional folks who we should -- other than the list of witnesses and other things, any additional attorneys or folks assisting the attorneys?

MR. MEAD: Not for the government.

MR. DONALDSON: No, your Honor. Thank you.

THE COURT: All right. Great. Thank you.

Yes, Mr. Mead.

MR. MEAD: And then I'm not sure what the Court's practice is on the instructing jury or when the Court plans to do it but this is a case with some press attention, and so we'd ask that there be some sort of instruction about not researching the case or discussing it.

THE COURT: And I haven't printed it out. But what I would say, Mr. Mead, from -- I'm having a senior moment with regard to the trial that you and your colleagues tried in front of me.

MR. MEAD: Pasqual.

THE COURT: So in Pasqual, you may recall that I made some preliminary remarks to everyone, which I can't remember, but I think -- I'm not sure in the front-end comments include, you know, not discussing, you know, the case and the like. If it doesn't, I can include that in the front-end discussion, as opposed to the longer discussion after we get a jury, just to make sure that the jury pool that it's clear to them also.

MR. MEAD: We think that makes sense, your Honor. Thank you.

THE COURT: All right.

MR. MEAD: And nothing else of substance. When would

the Court like us to provide the list of names and places?

THE COURT: I mean, if you can do it by close of business tomorrow, that would be great.

MR. MEAD: Yes, your Honor.

THE COURT: So we can add any -- we have to print out enough, I think we have 60 prospective -- 52, 55, 55 prospective jurors. So we have to print out copies for each of them.

MR. MEAD: We'll have it by the end of the day tomorrow.

MR. DONALDSON: Judge, I'm sorry. There's just one other thing.

THE COURT: Yes.

MR. DONALDSON: On paragraph 21, page 3, just to change the title related to myself. It's no longer Donaldson, Chilliest & McDaniel. McDaniel is now Judge Edwards in Supreme Court. Chilliest and I are no longer partners. So it should just be Xavier R. Donaldson, Attorney at Law.

THE COURT: Okay. The law firm, so it will read the law firm, Xavier R. Donaldson, Attorney at Law.

MR. DONALDSON: That's perfect. Thank you.

THE COURT: Okay. All right. Anything else with regard to the voir dire, Mr. Donaldson?

MR. DONALDSON: Yes, Judge. We are -- the defense team is going to get together and maybe put this in writing,

but we are going to ask for some language on implicit bias. It's been my practice, normally, another Court, when the jurors are seated, you're going to do the introduction statement and something after that, it's my practice to generally request certain implicit bias language at that time, then at another time, and then thereafter. So we would like to have the opportunity to put something together to provide that to the Court and the government so that the parties can review that and hopefully put that language in there.

THE COURT: All right. I know that that was part of the voir dire. What I'd like to get, a couple of things, I think some of my colleagues may do it. I've never provided or given instructions with regard to that. So I'd like the parties to, A, meet and confer about it, but, B -- and if there is some sort of agreement, that both parties would agree upon that could be provided to the jury in my preliminary remarks and it may be a little premature but suggestions with regard to anything in connection with the jury charge, I'll hear from it. But, otherwise, I'll make a ruling on whether or not I'll give that. And, obviously, to the extent, Mr. Donaldson there are -- you can point to examples in other cases before my colleagues and the language that they've used. Obviously, I would look to that. I have a vague recollection that Judge Schofield may provide such instructions at least in the preliminary remarks, but I'm not sure.

MR. DONALDSON: Yes. I know Judge Marrero did it for us in a case we had a couple of years ago, and few judges in the Eastern District did it for me in some federal cases over there. And I'm fairly certain that these fine prosecutors here won't object too much to some very good implicit biases, fair language to go on the record.

THE COURT: Let me put it this way. I haven't given it a tremendous amount of thought, but, you know, there are various instructions about bias and the like, and that's what the voir dire questions are designed to provide the jury with. So, I guess what I would say, if there's agreement, fantastic. Right? You know, I'm not going to, you know -- I mean -- absent, you know -- I'm not going to stand in the way if there's agreement, an agreement as to language, but if there's not and there's a decision that has to be made, I'll hear the arguments and figure it out.

MR. DONALDSON: That's all we ask. I appreciate that, Judge. Thank you.

THE COURT: Okay. So it would be in my preliminary -- so I can get that, you know, it doesn't necessarily have to be close of business tomorrow, but certainly by, you know, Sunday, Monday, at the latest, I would need to have that so I can evaluate it and be prepared to either make a ruling before we bring the jurors over or insert the language in my preliminary remarks.

MR. DONALDSON: Judge, yes, we can have that to you in very short order, more likely than not, by tomorrow, and just for the record purposes, there's like codified language now in the New York State Supreme Courts in their codified language and other states. So we can -- there's language that we'll provide to the government rather quickly, and I'm sure, again, they won't have too many objections. It will be nice, fair language to make sure everybody is fairly determining the result of this case. So we'll be good.

THE COURT: Okay. I mean, I'm not -- I'm not as sanguine that there will be necessarily agreement. I understand that there is a desire and the intention, but we'll just take it as it comes.

So, Mr. Donaldson, any other things with regard to the voir dire as distributed earlier today?

MR. DONALDSON: Not at this time, Judge. Thank you.

THE COURT: All right. Well, the only thing I'd ask, to the extent there is that I get -- with regard to specific questions, other than the issue of the implicit bias, I'd ask by the close of business tomorrow, so that we can get those questions finalized, understanding that, you know, my remarks are sort of separate and that's why, with regard to the implicit bias I'll hear from the parties about that. But if you get it by the close of business tomorrow, that's also great.

All right. So that, I think, I think covers the logistics and what we'll do is we'll turn the comments that have been made today and provided to the parties to make sure that we've incorporated everything that the folks have said but just to summarize, question 7 we'll indicate for the trial is not going to start next week, it will start the following week, on that Monday, change the -- in question 21, and Mr. Legon, add Mr. Lebrun, Mr. Legon as counsel and Mr. Lebrun as a paralegal, and those are the -- and then I'll -- we'll -- if the parties -- we may hold off until we get the list of folks and then circulate stuff.

So I know I said close of business tomorrow. Mr. Mead, if you can get it to us sooner, that would be fantastic.

MR. MEAD: We can do that, your Honor.

THE COURT: And if there's agreement, in other words, if you can run it by defense and they can add, you know, if there are going to be additional folks or just to make sure that everybody agrees on the list, that would be great.

My law clerk has just informed me that in the script itself, in the preliminary remarks, the initial remarks, I do indicate that when the trial starts, no harm in, I think, included it in two places, just to know that it will be covered.

Okay. All right. So let's turn to the motions *in*

limine. There have been two motions that have been filed, one by the government on September 5th and the other on September 12th. Let me ask defense counsel -- obviously the one today is just today, but does the defense intend to file anything with regard to the September 5th filing of the government?

This is the motion *in limine* to preclude evidence in cross-examining with regard to athlete 3's NCAA suspension.

MR. DONALDSON: Yes, Judge. I spoke to the government about that earlier. I think we have to -- in our opinion, his -- his and what a witness testifies, their credibility becomes an issue, so should the direct relate to issues related to whether or not athlete 3, who I'm thinking is a -- are we allowed to say his name on the record now?

(Counsel confer)

MR. DONALDSON: I'm sorry. I just wanted to make sure we were okay with saying the name on the record.

THE COURT: Yes.

MR. DONALDSON: So we're talking about Mr. Wiseman, then, yes, we, as I informed the government, we will be cross examining Mr. Wiseman and/or his mother related to any and all issues that directly relate to their credibility, specifically if they're -- not if, we believe there might be information related to them, either Mr. Wiseman or his mother violating certain rules regarding conduct that an athlete is supposed to

have regarding mother possibly receiving money that she's not supposed to be receiving knowing these rules and then intentionally violating these rules, Mr. Wiseman possibly knowing certain rules and then intentionally violating those rules for monetary gain. That seems to me to be clear, and, I guess, standard grounds for cross-examination because it does go directly to their credibility. So, because in my opinion, any witness that testifies their credibility is an issue, should we have the information that we think we're going to have that goes directly to or indirectly to their credibility, then we are or should be allowed to cross-examine those witnesses on that, I don't think we should be restricted in that way from developing whether or not these people are telling the truth or at least developing information so that the jury can properly determine whether or not they're being credible with their testimony and whether or not they have certain motives to be incredible.

THE COURT: I guess my question though is, you know, am I going to receive something in writing? In other words, I don't know what the exact rules are. I don't know -- I haven't gotten the 3500 material yet, so I don't know whether there was something in writing from the NCAA. You know, I have the government's proffer as to what transpired, but, you know, I, you know -- I don't know sort of whether there was a back and forth concerning -- and by back and forth, I am saying between

the NCAA, Mr. Wiseman and his mother, about -- about it. I do running recognize that my recollection was that Mr. Wiseman ended up going -- that the suspension was never an issue because he read it was a suspension in connection with college and he went -- he turned professional. Am I correct about that?

MR. KINDER: That's right, your Honor.

THE COURT: So, I guess, Mr. Donaldson, am I going to receive something in writing or additional -- well, let me, before I -- I apologize, when, in the cue of witnesses, would Mr. Wiseman and his mother be called as witnesses?

MR. MEAD: Towards the end of the first week, your Honor.

THE COURT: Okay. All right. So there's some time with regard to that, but, obviously, you know, we'd -- and I don't know whether anyone intends to open on this. I don't know --

So, Mr. Donaldson, is there going to be something I'm going to receive in writing with regard to this?

MR. DONALDSON: I can put something in writing. I think I would need -- I shouldn't say need, but I think it would be helpful if the government had any more information related to what they're trying to preclude us from asking about, but I'm speaking in general terms. But, yes, I can put something in writing before -- before openings, just in case we

want to open on it. And also on or before, of course, the first week when he testifies, but I can put something in writing. It will be very brief. But, again, it goes directly to what I just said.

THE COURT: Okay. Well, I think -- so the parties should meet and confer with regard to that. There's something in the motion itself where the government is, as I understand it, seeking to preclude questioning about the suspension itself and why I guess the suspension was -- so the parties should talk about that.

And, Mr. Donaldson, when do you think you might be able to -- assuming you're able to discuss it over the next day or so with the parties, when do you think you're going to be able to get me something?

MR. DONALDSON: It can be done by Monday or Tuesday of next week.

THE COURT: All right. Why don't we say Tuesday?

MR. DONALDSON: Jury selection is Tuesday.

THE COURT: So, by Wednesday, I'd like to get that. So if you get it to me earlier, that's great. If there's anything -- but I guess what I would ask is, to the extent that if there's information that's communicated with the defense about the contours of the questioning the government would seek to preclude or additional details about the fact about the suspension including any -- I'm not saying that you necessarily

need to dig this up, if it's not something that is already out there, the actual suspension, any communications back and forth, I just don't know what, you know, what there is. I mean it -- and the timing, in other words, when did Mr. Wiseman make the decision to go pro versus notified of the suspension. In other words, I don't know, to the extent he had already made up his mind up he was going pro and then the NCAA says, unbeknownst to them that he's already sort of made that decision or whether they knew it or not and they still issued the suspension, I don't know. I don't know.

Yes, do you know, Mr. Kinder?

MR. KINDER: I don't think I know the answer to the precise question you just asked. I think the point of the government's motion --

THE COURT: Can I ask you to, if you could pull the microphone.

MR. KINDER: Sure. I think the timing of the suspension issue still does not go to either witnesses' credibility or truthfulness. We certainly will meet and confer with the defense, but our view, I think as stated, in the motion that we're seeking preclusion of any questioning or evidence about the NCAA's suspension and the facts and circumstances underlying it because nothing about those circumstances goes to the credibility or truthfulness of the witnesses. We expect that Mr. Wiseman will testify -- would

testify, if asked, of course we're seeking to preclude that, that there was nothing -- that he was not aware of this payment, which was for moving expenses when his family was moving from Nashville to Memphis, and we expect that his mother would say that she did not think that there was anything wrong with accepting this payment from a coach who the family had had a relationship with, and that for both witnesses, once the NCAA, two years later, looked at this transaction after Mr. Wiseman had announced he was planning to attend the University of Memphis, they were completely cooperative with the NCAA's review. And so there's nothing about these facts that go to their truthfulness or their credibility.

THE COURT: Okay. All right. All right. So as I -- you know, with regard to that, you know, I'll get any additional argument from the defense and whatever the government wishes to add. I mean, the timing, at least in my opinion, without indicating one way or the other my sense, but if, in fact, you know, Mr. Wiseman had already made the decision or and/or announced it in some way, before the NCAA came out with this suspension, you know, it didn't impact one way -- in other words, putting aside -- putting aside impeachment, it's not something that was going through his mind in terms of going to the pros or not, you know, because my understanding of the scheme, the alleged scheme, was that moneys were going to be -- were borrowed, such that to be

provided to Mr. Wiseman, I think if this is -- if I'm correct, so that -- to -- grease the wheels, whatever, to get him to be more amenable to signing with a particular agency. So I just want to get a sense of the timing with regard to that so that I have it in mind in considering the defense's arguments about why they should be permitted to question Mr. Wiseman and his mother about these facts.

Okay. And, so, Mr. Donaldson, the second -- the issue of the second letter --

And I'll grant the government's request to file the letter, September 12th letter under seal.

But does the defense intend to respond to that? And, similarly, if there is going to be a written response, you can file that under seal also. Does the defense intend to file anything with regard to the government's September 12th letter?

MR. DONALDSON: This is the letter for today, right?

THE COURT: Correct.

MR. DONALDSON: Yes. We do as well. And we can do that, I guess, in short order as well. I just have to go through it a few more times and speak to cocounsel. But, yes, we plan on doing something as well.

THE COURT: All right. So if that could be done in the same timeframe as the response to the September 5th. Obviously, they should be two separate responses, one, the

September 5th response could be filed on the docket, the response to the September 12th, the government's September 12th letter could be filed under seal in connection with that in light of the fact that it is going to be a challenge and in light of the fact that they're -- that my understanding is that the text messages have already been provided to the defense.

Is that correct, Mr. Mead?

MR. MEAD: Yes, your Honor.

THE COURT: All right. So I'd like to -- and there was an argument that the government put forth under 403, I think I'd need or I'd want to see the text messages that could be filed under seal also. So that it, you know, I can make an assessment concerning any prejudicial impact or more specifically assess the prejudicial impact of the statements.

MR. MEAD: Without getting into details at all, your Honor, because we're in open court, it's a relatively long thread, and the messages are quite spread out. We could attempt to provide kind of all of them to the Court or we could provide kind of a sampling of them to the Court. Which might be more manageable. And then, of course, if the defense disagrees with our sampling, they could supplement on their own.

THE COURT: I guess I would say, and this also goes to the statements the government wishes to get in that are -- that

are going to -- that the government wishes to offer the text messages or emails where the argument is being made that Mr. -- that the witnesses's statements are provided for context. I'd like to get those also.

I think the issue is, you know, and, look, and I don't know, you know, there may be certain -- I mean, I don't know that the government is saying that, well, they should all be precluded, but -- so I should probably see all of the statements, because, to the extent that the response is, well, the response is, no, they should all come in or, well, no, with regard to certain of them, they're not as prejudicial as others.

I just don't know from what the government has provided. And my thought process with regard to the statements the government intends to offer, that would be in furtherance of the conspiracy by Mr. Briscoe, the communications between Mr. Briscoe and the witness, the potential witness. But my understanding is the government is not going to call him. I'd like to see what the -- there may be certain ones where there's no context needed, he where he makes a flat-out statement and, therefore, the response whether is, okay, or, yes, or whatever, and there may be others where the context is important. So I'd like to see that also.

MR. MEAD: We can put in a short letter before the weekend, and we can, one, provide the text messages of concern

to the Court which may be a quite long file, but we'll show some of them.

THE COURT: Yes.

MR. MEAD: And then separately, we can refer in that when we provide that to the Court, we can refer to the exhibits with the text we propose to introduce because we'll have provided that to the Court by the end of the day today so the Court can look at the messages for context.

THE COURT: That makes sense. That would be very helpful.

MR. DONALDSON: And, Judge, just on that point --

THE COURT: Yes.

MR. DONALDSON: -- I guess I'm jumping around in my list here, but I just now is relevant to my list.

So there were two letters from the government today. So the September --

THE COURT: Two?

MR. DONALDSON: Well, strike that.

The one we're talking about now is regarding the motion that they filed that they're -- regarding these text messages, my concern with that is what the way I'm looking at it, text messages between Briscoe and the defendant about the fraud, now, if -- my concern up front is that if --

Am I missing something?

THE COURT: No. That's part of it, but, yes.

MR. DONALDSON: Right. So my certain is if Briscoe, if Briscoe is not testifying and they're entering these or trying to enter these statements or these text messages that's a coconspirator, etc., which I get, the issue I want to front now and so that we can be prepared to resolve the objections as they come along, the context of some of those as we talked about earlier, the context of some of those text messages should not be or cannot be explained by the government. I guess what I'm trying to get in front of is, typically, in these trials, the government will say with the coconspirator's statements that they will have someone testify and he will say what someone else what he heard someone else said in furtherance of the conspiracy. I get all of that. And then he will he ask him, how did -- what did that mean to you or explain that statement, etc., I get that. But if we don't have the declarant, the person who sent, the emails, the text message, to explain or say what the context or the inferences are or whatever or the substance of the text message, my concern is thinking, further down the line, the government holding up text messages in closing saying, this was said, CP means Chandler Parsons, or when he said -- when they used the pronouns "he", the "he" meant somebody or the pronoun "she" meant X, Y, Z. That's a concern because if the person who sent the text message is not testifying to say who the "he" who is referring to or who the "she" is that they were referring to.

The government can't get up there and tell the jury who the "he" is in the text messages or who the "she" is in the text messages or who the C.P. stands for in the text messages or anything of that nature. The traditional method of their presenting evidence will be absent without the person who sent the text message or the person who received the text message. And so I want to --

THE COURT: Well --

MR. DONALDSON: I just want to front that issue now --

THE COURT: Sure.

MR. DONALDSON: -- because we're going to probably object to almost any text message that comes in where we don't have the sender or the receiver of the text message or the email to testify as to the context, meaning, inferences, etc. of the substance of the text message or email. I hope I'm not being confusing.

THE COURT: No. But I think what I'd have to see is case law supporting what you're saying because, you know, in a case where there's a conspiracy and the coconspirators are communicating with one another, and in particular, if they're actually a joint trial, you're not going to have that, you never have that. So there may be arguments that the government is going to make where they're asking the jury to draw inferences based upon testimony of other witnesses. So, for example, you know, we never signed a contract, we never had

conversations with Mr. Briscoe, we never had conversations with Mr. Darden. And, obviously, the defense will challenge -- do whatever the cross-examination is and may have information that, no, in fact, there were conversations or there were other things. So with regard to the, sort of, wholesale -- and obviously we can deal with it on a -- exhibit-by-exhibit basis --

MR. DONALDSON: Right.

THE COURT: -- but as a general matter -- and there may be arguments about in marshaling the evidence, how the government presents it, but I would have to see, you know, case law where you have a situation where it's alleged coconspirators having a conversation where a Court has precluded either the admission of those emails, texts, or whatever, or even recordings, on the -- where the note -- understanding that the government needs to establish, right, the existence of the conspiracy and the like --

MR. DONALDSON: Right.

THE COURT: -- but traditionally, and, you know, I can either make a ruling based upon a proffer in advance that they'll come in subject to connection or there will be testimony already setting up whether it's from some of the witnesses already setting up the nature of that, even if there isn't a cooperator who will testify about it.

MR. DONALDSON: To be clear, I'm not suggesting that,

as I said, that the -- if -- let's start with the if, if they establish the existence of the coconspirator rule and they -- if they satisfy the three elements, etc., fine, that's not the issue. What I'm saying is I just wanted to front so that when we're -- when this comes up during the trial --

THE COURT: Sure.

MR. DONALDSON: -- and then we're objecting, I don't want to say per exhibit, but when certain things come up, that's -- I guess I should just, as you finally said, that we will be, and I guess the Court will be addressing it as the exhibits come in and we approach each exhibit, but that's just something that I think I wanted to tell the Court early on, that that may be coming up and that may be happening so we won't during the trial, start just objecting.

THE COURT: Okay. All right. So, I guess, in line with that, what I would ask is that, obviously, the 3500 --

Well, let me ask, Mr. Mead, has the 3500 material, my recollection, is that there was some indication it's been provided to the defense?

MR. MEAD: Yes, your Honor. It was produced very early in the case, and it's been produced in an ongoing way to them since then.

THE COURT: Okay. So what I would ask is, you know, during the trial that the government obviously --

I can't remember. Did I request a witness list from

the government?

MR. MEAD: Yes, your Honor, by the end of the day today.

THE COURT: All right. Okay. But as the trial roles along, if you could provide the defense with, you know, the first week, these are the witnesses, certainly the first couple of days, these are the witnesses we intend to call and their general order, obviously, understanding that some witnesses may be -- you may need to call out of turn because they're lay witnesses, they're not in -- they have a flight, whatever it may be, just so that we -- in addition, provide -- I know that the exhibits, I take it, the exhibits have also been provided to the defense?

MR. MEAD: Yes, your Honor.

THE COURT: You know, provide the defense an idea about, you know, which exhibits are going to be offered, you know, any particular day so that we could provide and front end any arguments outside the presence of the jury without having to go to sidebar about objections to specific documents in advance of the trial in advance of the jury coming in.

MR. MEAD: That makes sense, your Honor.

THE COURT: Okay. All right. All right. So I'm going to be getting some additional submissions with regard to the two motions *in limine* more recently filed by the government from the defense.

So let's turn to the motions that have been -- that have already been filed and briefed by the parties. So let me hear --

So I'll hear any additional arguments the parties wish to make as I understand --

Well, let's first confirm that -- I think it's witness 1 -- that witness 1, the government doesn't intend to call witness 1. Is that correct, Mr. Mead?

MR. MEAD: Yes, with a caveat, your Honor.

THE COURT: Okay.

MR. MEAD: The caveat, and we said this in our letter, is we certainly don't intend to call him in our case in chief. We do reserve the right to call him in rebuttal. There's a conceivable defense of essentially blaming witness 1 by the defendant. If the defendant starts to go down that road, I think it's entirely fair of us to call witness 1. And I can say we've also served a slightly unusual if-as-when subpoena on witness 1 when for the rebuttal case only to ensure that he is available in case we do need to call him. So certainly not calling him in the chase in chief, not introducing his statement to the agent. Some of his statements in the course of kind of the facts at issue will come in. You know, people will say, I spoke with witness 1, he said X, but not calling him in our case in chief, not introducing his statements to the agents.

THE COURT: Okay. Let me ask with regard to witness 1's spouse. Is witness 1's spouse someone the government -- would witness 1's spouse be in the same position as witness 1 as a potential rebuttal witness?

MR. MEAD: I think that's right, your Honor. Witness 1's spouse received a good chunk of the proceeds of the fraud. We're certainly not planning to call her in our case in chief but I can imagine things coming out in the defense case that would cause us to call her in rebuttal.

THE COURT: Okay. And, similarly, has witness 1's spouse received an if-as-and-when subpoena, or, no?

MR. MEAD: No, your Honor. And as I'm thinking about the subpoena to witness 1, the FBI, we've asked the FBI to serve witness 1. We've provided a courtesy copy of the subpoena to the defense. I'm not sure whether he's actually physically been served, but if he hasn't, that will happen soon.

THE COURT: Okay. And do you know whether witness 1 or witness 1's spouse, whether they have counsel?

MR. MEAD: I don't believe so, but defense may have better sense than we do.

THE COURT: Mr. Donaldson, do you know whether witness 1 or witness 1's spouse has counsel?

MR. DONALDSON: I do not know.

THE COURT: Okay. All right. I would, just again, if

the FBI is going to go and serve them, but if they have counsel, you might be able to just circumvent them. That was the only reason for my asking that question.

Okay. So --

MR. DONALDSON: Judge, just to -- just to --

THE COURT: Yes.

MR. DONALDSON: I'm sorry. Just to button that witness 1 issue up, we are, of course, going to rely on the contents of our motion, and while we think witness 1 shouldn't be allowed to testify, rebuttal, direct, or otherwise, so we'll just rely on that information in that motion.

THE COURT: Okay. Well, what I would say, I'm not -- I think that right now the motion is moot --

MR. DONALDSON: Right.

THE COURT: -- except to the extent that the government believes during the -- either during direct examination or otherwise, somehow the door has been opened, although there won't be a rebuttal case unless the defense puts on a case, but I guess, what I would say, Mr. Donaldson, I could see, if there's questioning, I want to -- and I'm not saying that the government may basically say, no, we changed our mind, we want to call him in case in chief, or we might want to utilize a statement that was made, and I just want to get, to the extent that that happens, I want to get as much advance notice of that as possible, because there's the

competency issue and there's the issue with regard to legal arguments with regard to the statement and why that statement should be permitted in if there's not -- even if -- even if the testimony is not. So, you know, similarly -- and I would say that regard to any change in mind with regard to the government's direct case, but certainly, with regard to rebuttal, you know, I'd need to know in advance because we need to take care of that, or if the government does additional and basically may agree or come to the conclusion that the witness -- that there wouldn't be a need for competency hearing, the government would agree that the witness -- putting aside what the witness may have been able to say in the past, the witness, as a witness who would testify at trial is not in a condition that would elicit relevant information or relevant and reliable information.

MR. MEAD: If and when it comes up, we'll immediately alert the Court.

THE COURT: Okay. All right. So that -- that, I think, takes care of the defense's motion, understanding that everybody has reserved rights with regard to argument, if things change.

So let me see. So there were various other motions *in limine* that were put forth related to the government's motions *in limine*. So let me first hear if there's an additional argument that the government would like to make with regard to

its motion *in limine* regarding I guess the prior frauds, the testimony, the prior testimony of Mr. Darden, the issue about the preclusion of certain defense arguments with regard to -- and the prior good acts, negligence of the victims, prior good acts, and the Cohen jail text.

MR. THOMPSON: Yes, your Honor. Certainly with respect to evidence of the prior schemes, the government would like the opportunity to argue further. And I'll start there.

THE COURT: Okay.

MR. THOMPSON: Evidence of what is described as the defendant's prior schemes, and the government's motion *in limine* should be admitted both as direct evidence and then also admitted purposes under Rule 404(b), with respect to direct evidence, evidence of the defendant's prior schemes and his conviction for those schemes provides context and dimension to facts at issue with respect to the conduct in this trial. Specifically, the government anticipates calling a witness who is a lawyer, a general counsel for the WNBA, and the government anticipates that individual's testimony to establish that the background check of a potential buyer or an individual who would acquire a WNBA team was relevant and a previous felony conviction could preclude an individual from acquiring a WNBA team. And that's relevant, your Honor, because it explains and gives context why certain documents that were created and passed along by the defendant in connection with this fraud did

not include his name on it and why he included the name of certain other individuals.

With respect to the 404(b) --

THE COURT: Let me ask though, you said could preclude the person from an ownership interest. Is that --

MR. THOMPSON: I would say, your Honor, that a felony conviction -- this witness will likely testify that a felony conviction would certainly be relevant to the WNBA's board of directors in determining who they would select to purchase the team, to acquire a team.

THE COURT: So it would be information that would be provided to the board of directors to the WNBA but it's not preclusive -- in other words, it's not automatic? In other words, there are certain rules and the WNBA basically says, if you're a convicted felon, you can't have an ownership interest in a team?

MR. THOMPSON: I do not believe the witness would testify that it would be strictly prohibited and delineated somewhere as preclusive.

THE COURT: So let me ask, and, again, this is separate and apart from the other -- the other bases the government seeks to offer the prior felony convictions, why then is it relevant for the witness to say that it's a felony conviction as opposed to certain things that come up in a background check could be preclusive of Mr. Darden being an

owner and that the lawyer become aware of that and I don't know there may have been -- there were two lawyers involved, so but one of them, my understanding is, actually had a communication with Mr. Darden, so why does it need -- and, again, in this context, why does it need -- why does the felony conviction -- why is that relevant as opposed to something came up in the background check in other -- because it's not entirely preclusive, right, and even if it were, I guess, you know, why wouldn't it be that something came up and Mr. Darden was -- it was already determined that he couldn't have an ownership interest?

MR. THOMPSON: Yes, your Honor, that's a plausible argument. The direct evidence says that evidence is to provide context and dimension and here the prior convictions do just that. The witness testifying at a high level of generality that the Court just offered that there was something in the background check, it invites actually more speculation as to what was the basis for which this individual was not permitted to purchase the team. And that's actually not called for under the rule of direct evidence and also probably more potential prejudicial to the defendant.

THE COURT: Yes. But I would just issue a curative instruction. In other words, look, through there are two separate things going on here. And, so, what I guess what I'm questioning is with regard to this witness and providing

context, how much did -- do you really need that it's a felony as opposed to something else in the person's background, you know, that, for example, they ask for their tax record or they need their bank accounts. Like, this is not really related, but like when you go apply for co-op and they want to look at your bank accounts to see how much money you have in the bank, you know, here, in other words, it could have been something like that, that he doesn't have the financial wherewithal and that could be preclusive of him having an ownership interest.

So I guess I'm not as sanguine about the felony conviction being something that would come in this -- in this particular context as direct evidence if it could be sanitized and there could be a curative introduction, given he doesn't have to speculate as to what this reason is. It's not relevant to their consideration. That's putting aside the other bases that the government seeks to offer that information.

MR. THOMPSON: Understood, your Honor.

And if the Court will allow me now, I'll transition to the 404 --

THE COURT: Sure.

MR. THOMPSON: Your Honor, the defendant's conduct in the prior scheme should be admitted for permitted purposes under Rule 404(b). It's important to provide some context for each of these three schemes, your Honor. So I'll first do that and then I'll explain how they are essentially identical to the

means in which the defendant carried out the schemes in this case.

Your Honor should also have a transcript from case *United States v. Harvey Newkirk*. That was before Judge Rakoff 14 Cr. 534. A copy of that transcript has also been provided to the defense. I will make some citations to that transcript. And if the Court will allow me to read certain passages because they demonstrate how the defendant's conduct in the prior schemes is a one-for-one and should, therefore, be admitted.

THE COURT: Let me ask a question, Mr. Thompson, which is the following: Has the government produced Mr. Darden's 3500 from that trial?

MR. THOMPSON: Yes, your Honor.

THE COURT: Okay. Is that 3500 material part of the materials that I'm going to get, or, no?

Yes, Mr. Mead?

MR. MEAD: It's been produced in discovery. We don't typically separately stamp the 3500 for a defendant. If the Court wants it, we, of course, can provide it to the Court though.

THE COURT: I guess the question is, when it was provided to defense counsel, was it basically, you know, the binder that was provided to the defense in the Newkirk case? In other words, with his 3500 material, or was it documents interspersed in there?

MR. MEAD: So the Newkirk trial it was a while ago.

THE COURT: Yes.

MR. MEAD: And so A.U.S.A.s were gone and so, just to be totally transparent with the Court about what we did, we got access to the shared drive file for that Newkirk case. We found a 3500 folder for Mr. Darden digitally. We looked through it. We reduped it and then we produced everything in it to Mr. Darden's counsel. We understand it to be kind of a one-for-one match of the 3500 in the Newkirk case, but just, is it possible something was missed because it was nine years ago? It's conceivably possibly.

THE COURT: Okay. I mean, I guess I would like, if you can segregate, I would like to have that, just in case things come up.

Do you know, Mr. Mead, or who Mr. Darden's attorney was back then?

MR. MEAD: I was just having an off-the-record conversation.

MR. DONALDSON: Federal Defenders, I believe.

THE COURT: It was the Federal Defenders? All right.

I'm sorry, Mr. Thompson. Go ahead.

MR. THOMPSON: Not at all, your Honor.

So the first of the previous schemes is a boxing scheme. The defendant represented to a victim that the victim's loan of 400 -- $450,000 would be used to plan a

purported boxing match. The defendant also represented that witness 1 would provide financial support and provided the victim with a promissory note with witness 1's name on it.

Your Honor, in this case, there are multiple instances in which the defendant used witness 1's name on contracts where the materials that were provided to victims without witness 1's authorization. And pointing to transcript page 840 --

THE COURT: One second. Yes.

MR. THOMPSON: Lines 3 through 9:

"Q. Have you ever used --

Your Honor, to step back for a minute, I'm reading from a transcript. However, we have been you using witness 1 throughout this proceeding so I will be using witness 1 in the place of --

THE COURT: That's fine.

MR. THOMPSON: Okay.

"Q. Have you ever used witness 1's name on contracts associated with Rain's business?

"A. I have.

"Q. Was that with or without his authorization?

"A. That was without.

"Q. Was that with or without his knowledge?

"A. Without.

That's exactly what the defendant did in this case.

In addition, your Honor, in the boxing scheme, the

defendant impersonated witness 1 using a phone in phone calls and in messages. I would point your Honor to transcript page 850 to 851, starting on line 22, at page 850:

"Q. Have you ever impersonated witness 1 using the 4067 number?

"A. I have.

"Q. Have you ever impersonated witness 1 with the intent of fooling Mr. Newkirk?

"A. I have not.

"Q. Have you ever impersonated witness 1 on telephone calls that Mr. Newkirk participated on?

"A. I have.

"Q. And when you did that, would you alter your voice in any way?

"A. No.

So, your Honor, the defendant has explained that in carrying out previous frauds he used witness 1's name on documents that he passed to victims, he impersonated witness 1 in conversations with victims in the past, just as he has in this case.

Turning to --

THE COURT: I apologize.

MR. THOMPSON: Yes, your Honor.

THE COURT: I apologize, Mr. Thompson, but was that -- was this number also used in this case, the 4067, or, no?

MR. THOMPSON: It's a different number at issue in this matter, your Honor.

THE COURT: Okay. All right. Go ahead.

MR. THOMPSON: However, the 4067 number in the previous frauds was the defendant portrayed was associated as witness 1, just as he has with certain numbers at issue in this matter.

THE COURT: Okay. But the numbers -- the portrayed number, 4067, was that number or an actual number of witness 1 or not? And, similarly, in the numbers utilized in this case, was that --

MR. THOMPSON: I do not know the answer with respect to the 2014 matter, whether the subscriber information for the 4067 number and whether it was actually associated with witness 1. And the numbers at issue in our case in which the defendant held himself out or caused victims to believe that that they were speaking with witness 1 were not subscribed in the name of witness 1.

THE COURT: Okay. All right. Go ahead.

MR. THOMPSON: The second previous scheme is described in the government's motions as the exhibition scheme. The defendant used witness 1's name and his professional reputation to develop contacts and arrange for purported -- or arranged financing for purported basketball games. The defendant convinced a Taiwanese entertainment company to invest half a

million dollars, again, to purportedly an NBA to take place in Taipei. And in connection with this fraud, the defendant represented that witness 1 had meetings and had discussions with NBA officials and owners of the Knicks. Again, your Honor, the defendant impersonated witness 1 to induce victims as part of the exhibition scheme to wire him money. I direct your Honor to transcript page 941 beginning at line 19.

THE COURT: Okay.

MR. THOMPSON: I direct --

"Q. I direct you to the first paragraph of this document where it refers to a professional basketball exhibition game in Taiwan.

"A. Yes.

MR. RICCO: Which page?

MR. THOMPSON: This is page 941 of the transcript.

"A. Yes.

"Q. Can you briefly describe the crime that you pled to in that count?

"A. Sure. I was negotiating with a gentleman in Taiwan about bringing a basketball game or having a professional basketball game in Taiwan and I got him to basically send the money up front because the game had occurred if that is sufficient.

"Q. Did you impersonate witness 1 in connection with that?

"A. I did.

"Q. And in addition to that exhibition of the basketball game,

did you also take part in an attempt to organize the business venture relating to the national basketball association?

"A. I did.

"Q. Did you impersonate witness 1 in connection with that venture?

"A. I did.

In addition, your Honor, in the second scheme exhibition scheme we're discussing, the defendant also signed on witness 1's behalf without witness 1's knowledge and sent emails in which he held himself out or pretended to be witness 1, I would direct your Honor to transcript page 1046.

THE COURT: Okay.

MR. THOMPSON: Beginning at line 2.

"Q. You did sign documents on behalf of witness 1 in that, correct?

"A. I'm sure.

"Q. You testified that this was all done without the knowledge of witness 1, right?

"A. That -- I testified that what exactly was done without the knowledge of my father.

"Q. Impersonating him?

"A. Yes. That was done without his knowledge.

"Q. Emailing as him?

"A. Yes. That's correct.

"Q. Signing as him?

"A. Of course.

And the third scheme, your Honor, the defendant convinced a financing company to provide a bridge loan of 3.1 million based on representations that he and codefendant made -- excuse me, that a coconspirator made they intended to purchase Maxim Magazine. As part of this fraud, the defendant and a coconspirator impersonated witness 1 to convince investors, again, relying on witness 1 -- witness 1's professional reputation and his status, impersonating witness 1, they induced victims to loan them money in furtherance of this fraud with one victim provided the defendant with five and a half million dollars.

Again, your Honor, as part of this fraud, the defendant signed a promissory note as witness 1. That's transcript 879 pages 13 to 23. I won't read that citation unless your Honor would like me. I'm just pointing you to it. The defendant signed emails as victim -- excuse me, as witness 1 in connection with this fraud. I would direct the Court to transcript page 889, lines 1 through 10, and transcript page 896, lines 14 to 22. The defendant impersonated witness 1 on the phone to victims. I would point your Honor to transcript page 923 to 925, lines 17 to 19, and I will read a citation, your Honor, at page 899, in which the defendant explains how he impersonated witness 1 to induce his victims.

THE COURT: Okay.

MR. THOMPSON: Page 899 starting at line 11:

"Q. Did there come a time that you --

MR. RICCO: Which page are you on?

MR. THOMPSON: Page 899.

MR. RICCO: 899?

THE COURT: Yes. Line 11.

MR. THOMPSON: Line 11.

"Q. Did there come a time that you spoke by telephone with representatives of Combest Capital?

"A. I did.

"Q. Approximately how many times were you on the phone with Combest?

"A. I believe it was three, maybe four.

"Q. So with respect to the first time that you ever spoke on the phone with Combest, did you do that as yourself or impersonating witness 1?

"A. As myself.

"Q. Did you have any discussions with Mr. Newkirk regarding the conversations you had with Combest as yourself?

"A. I did.

"Q. Can you describe that conversation?

"A. Yes. He told me that they weren't comfortable with me in the deal and that it had to be, in order for them to move forward, it had to be witness 1.

"Q. Following the signing of the letter of intent, did you

have any -- did you have another conversation over the phone with Combest representatives?

"A. I did.

"Q. And at that time, did you speak as yourself or as witness 1?

"A. As witness 1.

"Q. And why did you do that?

"A. Because they had just said that they didn't want me involved in the deal and that they wanted witness 1 to speak or they wanted, you know, witness 1 on the phone.

So, your Honor, the three frauds that I just summarized for the Court and the transcript citations that your Honor indulged me in allowing me to read demonstrate that the conduct that the defendant carried out in the past is identical to what he did to perpetrate the fraud in this case. First, the defendant impersonated witness 1 using the phone, either in phone calls or sending text messages to induce individuals to believe that they were speaking with witness 1. This happened with respect to a coconspirator, and it also happened with respect to certain bankers that were at issue or that were involved in this fraud. Second, the defendant, as in his previous frauds in this case, fostered the impression that witness 1 would be involved in this fraudulent transaction. The defendant circulated documents that gave the impression that witness 1 would be involved in this transaction to acquire

a professional sports team. The government anticipates calling witnesses who will testify that they were under the impression or given the impression that they were speaking with witness 1 throughout conversations with the defendant. And your Honor, all of this underscores that the purposes that this evidence of the previous schemes should be admitted for the purpose of intent, plan, knowledge, motives, and *modus operandi*, which are permissible purposes under Rule 404(b).

With respect to knowledge, evidence of the previous schemes clearly shows that the defendant knows how to carry out fraud. He -- it also demonstrates his plan and his intent. The defendant had a playbook when it came to carrying out his frauds. The previous -- the evidence of the previous schemes shows that he knew how to plan and execute these crimes and that he intended to do it in a particular way because he had been successful in particular *modus operandi*, that is by impersonating witness 1.

The *modus operandi* piece, your Honor, I want to underscore that this is not a situation where the government seeks to introduce prior bad acts or previous convictions in which a defendant merely impersonates various people. This is very specific. The defendant impersonates the same individual, witness 1, and conveys an impression that is witness 1 through the same channels, through the phone, by sending emails, and by circulating documents with witness 1's signature. So there is

a direct one-for-one here.

And, finally, your Honor, with respect to *modus operandi*, that is -- this evidence is particularly important because of the conversation, the colloquy you had with my colleague, Mr. Mead. The jury will be shielded from witness 1 in this case because, reserving the rights that the parties just had in its discussion with the Court, there is a possibility in which the jury never hears from witness 1 and that would leave them with the false impression that this was not a repeated pattern by the defendant, this was not his *modus operandi*, to impersonate witness 1. So the evidence should come in there for that reason as well.

So, finally, with respect to 403 balancing, your Honor, the evidence is nearly identical to one another. So there's no risk that it is more sensational or disturbing and no basis for to be precluded under the 403 balancing.

I'm happy, your Honor, to explain now why each of the defense's arguments on this point fails, or if you'd like to hear from the defense first.

THE COURT: Why don't I hear from Mr. Donaldson, and then we can come back to, you know, why you believe that the arguments fail.

Okay. Mr. Donaldson, do you have anything to add with regard to the papers that you submitted --

MR. DONALDSON: Yes, Judge.

THE COURT: -- or with regard to the arguments that Mr. Thompson just made?

MR. DONALDSON: Yes, Judge. I do. I'll try to be brief, if I can? Sometimes it's a little hard, but I'll try.

I think that one of the government's arguments, all three of them are, in my opinion, fail miserably. Initially, as a general proposition, from our position, there is no similarity here, the government is simply trying to substitute the prior cases for this case to, what we believe, is fill in some gaps for the lack of evidence that they for this case. So, and I'll go backwards, part of that starts with the -- with the recent acknowledgment, and that is, when they were saying it, I was writing it but they then admitted it, they are arguing propensity and they're trying to couch it in the terms of 404(b), but they're really using -- it's really actually substituting the prior cases for the evidence for this case and their lack thereof, and they just admitted that when they said that the person who they claim my client is trying to impersonate, they don't have that person, so, therefore, we need to bring this evidence in to substitute for what they don't have.

THE COURT: My understanding of what Mr. Thompson said is that there are going to be witnesses who will testify, not witness 1, but a witness who will testify, I was under the impression that I was speaking with witness 1 or that witness 1

was part of the deal, or that -- or that witness 1 was sending me an email or a text, and so I assume, with regard to emails and texts, they will be evidence that will show that that was an email, IP address or phone number or something that --

Let me ask, Mr. Thompson, will there be evidence that certain communications came from IP addresses or phones that are associated with the defendant?

MR. THOMPSON: Your Honor, I don't believe that the government anticipates introducing IP address evidence but the government anticipates introducing other bases why the witness believe that they were speaking to and corresponding with witness 1.

THE COURT: Okay. And with regard to proof that that simply wasn't the case, what is the evidence with regard to that?

MR. THOMPSON: With respect to that --

THE COURT: That wasn't -- in other words, that they were, in fact -- that they weren't -- in other words, that witness 1 was not involved?

MR. THOMPSON: One bases is subscriber records for certain phones that were used to correspond with certain of the witnesses that the government anticipates calling.

THE COURT: Okay. And the subscriber information is associated with, in other words, where --

MR. THOMPSON: With at least one of the phone numbers

the subscriber has, the defendant's address is listed as the address of record for that particular phone number and also an email account that the subscriber records for that email account are associated with the defendant.

THE COURT: And at the time, where was the defendant living?

MR. THOMPSON: In Atlanta -- in Georgia.

THE COURT: All right. And where was witness 1 living?

(Counsel confer)

MR. THOMPSON: Your Honor, forgive me, at the time relevant to this case and the frauds, my understanding is the defendant was between Atlanta and New York.

THE COURT: Okay.

MR. THOMPSON: But to answer your question, witness 1 was in Georgia.

THE COURT: Okay. But not in the -- well, was witness 1's home -- did witness 1 live with the defendant?

MR. THOMPSON: I do not believe so.

THE COURT: Okay. All right. Thank you.

MR. DONALDSON: Judge, I was going to --

THE COURT: Let me ask just another question: Is knowledge and intent -- are you taking knowledge and intent off the table? In other words, or is that going to be an issue in the case? In other words, the defendant's knowledge and

intent?

MR. DONALDSON: Well, let me -- if I can go backwards before I get to that.

THE COURT: Okay.

MR. DONALDSON: If you don't mind, I think the Court hit part of what I was getting to was the government's argument that this impersonation has to stand on the fact that, in fact, that didn't happen, that these people were not, in fact, speaking to witness 1. And that's part of the problem. That's what I'm saying they're substituted. Because there is going to be evidence that they can't contest that their witnesses actually did speak to witness 1, that their witnesses actually did have Zoom calls with witness 1 as opposed to the other cases, I believe, where those witnesses probably would say they saw, they spoke to the person in advance, so then they didn't know who they were speaking to on the phone so then they thought, X, Y, Z. That's not the case in this particular situation. There is significant evidence that their witnesses spoke to witness 1, recognized witness 1's voice, knew witness 1 for quite some time, and knew that it was him that they were speaking to. So to now come back and say, well, later on, we're -- we don't know who we were talking to, that's an issue of fact for the jury to decide, not for them to substitute prior cases and say, well, he impersonated back then so he must be impersonating now.

THE COURT: That argument goes to MO, but it doesn't go to knowledge and intent. So I understand what you're saying, that -- and the government can argue, you know, inferences and the like, but is knowledge and intent going to be something that the defense is going to take off the table?

MR. DONALDSON: Unfortunately for me, I don't like taking things off tables.

THE COURT: But you have to understand, I mean, the law seems fairly clear that if those issues are left open, even to the extent there's some case law that suggests that even if it's an argument -- even if it isn't directly challenged, if it's sort of -- that it has to be explicit to be taken off -- to eliminate the argument that -- and, again, the law is obviously is -- you know, Second -- in the Second Circuit takes an inclusive approach, unlike, I think, in state court where I think it's much more difficult for the people to -- with regard to 404(b) type of evidence, but in the circuit -- so I take from what you're saying, at least right now, it's not off the table. Is that correct?

MR. DONALDSON: I'm saying that, right now, yes. But even if, to continue that analysis, we still have to -- again, we still have to go to the other steps, even if that was true, and even if we're saying that a fraud did not occur, that this was not a fraud and this did not occur as they are saying it occurred, and if we are saying that there was not an

impersonation because they, they being the government, have specific information that witness 1 specifically participated in several meetings or phone calls with several of their witnesses that cannot be contested, then the other way they can say that this is similar to the other part is to try to couch it in a whole different argument is to say, well, it's not the same but, now, you know what, because intent is the issue, we can use these prior incidences to show intent, that goes right back to propensity and that goes right back to unfairly prejudicial, but they're trying to find a circle way of substituting again, which is what they're really doing, trying to substitute prior convictions and prior conduct for the lapses or lack of evidence in this case and having this jury when that sits here convict him based upon something that happened 14 years ago and not based upon what they're charging him with. And that's what the government is doing.

So even if we say that knowledge and intent is an issue, they still can't over the unfairly prejudicial part of trying to convict him based upon propensity and claiming that he impersonated, when, in fact, they have information that he didn't.

THE COURT: Although -- let me ask with regard to the nature of the prior convictions and the fraud scheme, am I correct, you're not arguing that they're somehow -- well, are you arguing that they're somehow more -- somehow more egregious

than the allegations that the government has put forth in the indictment?

MR. DONALDSON: Taking -- taking more egregious, as far as conduct, does not -- does not only go by similarity, it also goes by volume. If you have, one, two, three, four claims by the government that he impersonated, one, two, three, four different times, then that, by definition would make it more -- or more, I guess -- I guess egregious or unfairly prejudicial because of the number. So if you said I have one case that was similar and say, well, that's not -- because it's the same facts, then that can't be more prejudicial.

THE COURT: But, again, let's separate out the idea of *modus operandi* and even separate out witness 1.

MR. DONALDSON: Okay.

THE COURT: The issue of committing false -- fraud by false presentences, making representations that aren't true, putting aside witness 1, my understanding of the indictment is that, again, putting aside witness 1, that there were representations made that the government alleges in this case were false, my understanding of the prior frauds is that there were representations made other than witness 1's involvement that were the government -- well, the government alleges and that maybe there's testimony about, that were false. So the issue, again, comes back to, you know, because each of the issues under 404(b), MO, knowledge, intent, are separate bases.

MR. DONALDSON: Right.

THE COURT: I mean, maybe if you could point to cases where the government's making an argument with regard to each, and MO is one of them, and the facts with regard to MO sort of overtake the other arguments that are made such that Courts v. have precluded any testimony about that, when, again, knowledge and intent is something that hasn't been taken off the table.

So I understand the argument you're making with regard to MO, and the intensely factual information that perhaps I would need to get in advance of making an MO determination, but with regard to sort of knowledge and intent, as I read the case law, MO is something the government has to affirmatively establish similarities between the two. With regard to knowledge and intent and making false statements and the like to induce folks, victims, to do certain things, you know the case law appears to suggest that, you know, and here there are crimes to which Mr. Darden pled guilty and then subsequently testified to.

MR. DONALDSON: I think that your Honor is correct related to one -- well, of course, you're correct to the inclusionary approach developed and adopted by the Second Circuit. We understand that completely. But it still is within the Court's complete discretion whether or not to allow substantially similar convictions related to substantial similar crimes, three of which from a knowledge or intent

analysis and whether or not that still approaches unfairly or unduly prejudicial to the point where the jury is no longer considering the evidence that it has before it, but substituting the prior convictions for what the lack of what the government has and then concluding or basis of the conviction on that.

Notwithstanding knowledge or intent, notwithstanding the inclusionary approach, we still, they still, can't get past the significantly unfairly prejudicial effect of this jury hearing about three prior convictions that they're alleging were similar and that's what they're going to have to try to allege that, that they were similar, to bring those up, that's -- that part would be significant departure from what we would consider to be a fair process, and that's why I believe the Second Circuit, even though it has an inclusionary approach, leaves it in the fine discretion of the Court to decide whether or not that kind of evidence is necessary for them to go forward with their case, which in this instance it clearly must not be -- clearly is not except for, like they acknowledge, the fact that they have an absence of evidence related to these -- to this case, and they're using the prior convictions to substitute for that. Literally, we don't have this element, you use that prior conviction, replace it there, and go that way. That's what this imagery is turning out to be. And that is what Second Circuit, I believe, frowns upon

when they start trying to convict, not on evidence, but on things from the past. Notwithstanding the fact that it's 14 years old and time lapse and all that stuff.

THE COURT: But let's talk about the timing. Right?

MR. DONALDSON: Before we get --

THE COURT: Go ahead. Okay.

MR. DONALDSON: I have to use the bathroom. Okay.

THE COURT: All right. Sorry. So why don't we take -- come back at 3:20, and we'll continue the argument from there.

MR. DONALDSON: Very good. Thank you.

THE COURT: All right. We'll stand adjourned.

(Recess)

THE COURT: Okay. Actually before, Mr. Donaldson, you continue, Mr. Legon, if I could, you need to file a notice of appearance in this case, that would be great.

MR. LEGON: Certainly, your Honor. As soon as I get back to my computer, I'll draft one.

THE COURT: Fantastic. All right. Go ahead, Mr. Donaldson.

MR. DONALDSON: Judge, I think -- maybe I was answering one of your questions, but I think, I'm purely -- I appear to be done with the 404(b) arguments, to the arguments.

THE COURT: Okay.

MR. DONALDSON: Yes. I think we covered as much as I

need to cover on that right now.

THE COURT: All right. Is there anything that you -- the government hasn't addressed the other -- certain defense arguments, the negligence of the victims, if you want to -- or the prior good acts or potential punishment or the Cohen jail text.

So -- well, let me ask, Mr. Thompson would you be doing any argument on that? Or is the government not going to be saying anything additional with regard to those?

MR. THOMPSON: I think my colleagues will handle some of the other motions, your Honor, that you just recited.

THE COURT: All right.

MR. THOMPSON: Let me know if your Honor was interested in hearing rebuttal.

THE COURT: Yes. I'll hear you on the issue of 404(b).

MR. THOMPSON: Your Honor, the defense focused principally or ended his remarks on the 403 balance increase. So I'll start there. The probative value of the prior convictions, the evidence of the prior convictions is clearly high. There is a one for one essentially the same conduct was perpetrated in the past convictions. It's modus, intent, and knowledge. The probative value speaks for itself.

There is also, the risk of prejudice inquiry is also limited, your Honor. The evidence is not more sensational or

more disturbing. They are financial crimes in which the conduct again is essentially the same. It's not -- the probative is not outweighed, and certainly not substantially outweighed.

Just briefly, your Honor, to address why the defense's argument is incorrect both today in its oral commentary and on the papers, the defense argues with respect to temporal limitation that Rule 609(b)'s ten-year limitation on convictions or more than ten years old precludes the government from introducing evidence of the prior frauds for purposes permitted under 404(b), that is clearly incorrect. Neither of those two rules includes any temporal limitation with respect to use of convictions for purposes that are permitted under Rule 404(b). In fact, I would point the Court to the 2011 commentary notes which say that the limitations of 609 are not applicable if the conviction is admitted for a purpose other than to prove a witness' character for untruthfulness. And, of course, your Honor, they're multiple decisions from the Second Circuit in which the appellate court has affirmed decisions from district courts admitting bad acts and previous convictions for purposes that were allowed under Rule 404(b) that are much further in time than the defendant's convictions in this case. I point the Court to the *United States v. Curley*, 639 F.3d 50, 59, Second Circuit. They said that the District Court did not abuse its discretion in admitting

previous convictions for domestic abuse that were over 15 years old and there were admitted with respect to intent. The defense spoke about not just the temporal issue with respect to the previous frauds, but also the number of them in *United States v. Abreu*, 2023, WL 8270427 at *2. The Second Circuit held that a district court's admission of drug-related paraphernalia on two separate occasions, 11 years and 13 years ago, was not error because the prior acts, despite their temporal remoteness, there was striking similarity between the prior acts and the conduct at trial, just as there is here.

So, there is no temporal limitation to the introduction of this evidence for permitted purposes under 404(b). There is no risk that the prejudice outweighs or significantly outweighs its probative value. And for those reasons, your Honor, we should be permitted to introduce the evidence.

THE COURT: Let me ask, doesn't 609, 609 speaks to a defendant, when a defendant is going to testify, right?

MR. THOMPSON: That's right, your Honor. 609 speaks about use of prior convictions for impeachment purposes on cross-examination, your Honor. And since your Honor asks, if you'll allow me, the arguments with respect to 609 in the defense's brief are incorrect, in and of itself, because the defendant was convicted, the judgment was entered in 2016, the rule says that the ten-year limitation dates to what's later,

the date of conviction or when the defendant finished his period of incarceration, which was 2017. So, even in analyzing these convictions, if the government intended to use them for impeachment purposes on cross, they would not precluded under Rule 609.

THE COURT: Well, that's 609(b).

MR. THOMPSON: That's right, your Honor.

THE COURT: But 609 -- I mean -- my understanding is that the defendant pled guilty to two frauds -- but then pled guilty again in January of 2015, so that the ten-year, am I correct, the ten years hasn't even rung, even assuming that 609 somehow would somehow apply?

MR. THOMPSON: That's correct, your Honor. That's correct. First of all, it does not apply because the government, for the purpose of the motion, your Honor, we are discussing right now we are seeking to introduce as evidence -- for direct evidence under Rule 404(b), there are no temporal limitations under either of those purposes, even engaging with the previous convictions, for 609 purposes, the ten-year limitation does not apply because the conviction was within the ten-year period and the date of the defendant's release from custody was 2017, and the date of conviction or the release from custody, the later ones, would trigger the ten-year rule.

THE COURT: Okay. All right. Mr. Donaldson, is there anything you want to add with regard to 609 argument that has

been made in the papers or in light of what Mr. Thompson has said?

MR. DONALDSON: Nothing at this point, Judge. No.

THE COURT: Okay. All right. All right. So with regard to the other arguments that are put forth, I don't know, Mr. Mead, are you going to handle that or someone else on the team with regard to the negligence of the victims, the prior good acts and potential punishment and then or maybe -- maybe I should deal -- well, and then the last thing being the Cohen text.

MR. MEAD: I'll start with the last one because I think it's the shortest and the easiest.

We make a bunch of arguments in our papers that we think are correct. In our letter today we put in a footnote explaining that we think that motion is not moot largely because of the person who is not going to be testifying now. I'm sure the defense hasn't had a chance to fully think that through but in our view is that even if there had been a basis to cross-examine before, there's now clearly no basis to introduce those text messages.

THE COURT: Because it would just literally just become -- like, there's no witness on the stand, so it would just be what, I mean, even to lay -- here's, the text a basically?

MR. MEAD: Exactly, exactly, your Honor.

THE COURT: All right.

MR. MEAD: Then we turn to the defenses, I think there's kind of two issues here, one of which is whether these are allowable defense and, then, two, is when the Court should preclude them. On whether they're allowable defenses, I think it's just black letter law that they're not. We cite Second Circuit cases saying that they aren't. The defense points to a civil case in which negligence evidence was allowed. Of course, in a civil fraud case negligence and reliance is part of a case. In a criminal case, black letter law, it's not. None of these defenses are admissible. The defense has not put forward any basis for thinking that they even might be admissible.

The next question is, well, the defense says, just trust us, let's figure it out as we go along and see what happens and see whether they should come in. And, obviously, the problem with that is we don't know what the defense is going to argue. The defense can put you the idea put the idea out there just by asking a single question, they can open on it, they can close on it. We don't know until it's out of their mouth. That's why we move all the time in advance to preclude irrelevant arguments to make sure that defense doesn't make them because the second they make them even in one sentence the cat can be out of the bag. It happens in trials, you know, all across the district. We don't think there's any

other reason here. If the defense wants to put forward, kind of, a more clear reason, about like, I should be able to ask this specific question or introduce this specific piece of evidence, you know, that contravenes that general rule, we're happy to engage with the defense on that and then with the Court, if necessary, but idea that they should be able to just kind of throw up whatever arguments they want even though we've identified them in advance as plainly irrelevant and inadmissible, I think, is wrong.

THE COURT: All right. Anything on the potential good acts or punishment -- the text, we've already dealt with.

All right. So let me hear from Mr. Donaldson.

MR. DONALDSON: Judge, I mean, I understand the government's position that they do it all the time in all their cases, but I -- I have tried my fair share of federal cases and state cases and I try real hard not to ask inappropriate, improper, or unlawful questions. So I won't be doing that. So that's all.

THE COURT: Well, let me ask: Then do you agree that this issue about whether some of the victim -- Athlete 1, Athlete 2, that their negligence, you're not going to be asking questions relating -- that suggest that somehow they are negligent in whatever and you're not going to cross-examine with regard to that?

MR. DONALDSON: No. I won't be -- I'm saying that I

will not be making an argument that the fraud didn't happen because of some negligence of somebody else. If there is -- not if -- we will be questioning their witnesses related to credibility issues and things directly related -- that are relevant to cross-examination purposes. That's what we would definitely will be doing, but we will not be arguing to the jury that this fraud didn't happen because someone else was negligent. That, we definitely won't be doing that.

THE COURT: All right. Well, I guess the issue is not -- and it may not necessarily be so much an argument, but if the examination is such to say, for example, you know, when you were talking with the defendant, you know, did you -- what investigation did you do concerning the defendant, what investigation did you do concerning the underlying transaction, what, you know, what sort of things -- in other words, that suggests that -- that the victim, him or herself had certain -- that should have done all this stuff, and they didn't do it, without even if you don't stand up in opening or summations to say, look, they didn't do, X, they didn't do Y, it's sort of putting it out there. So, I understand what you're saying, Mr. Donaldson, that you're going to examine the witnesses, but the suggestion by asking, you know, you didn't do due diligence here, did you, is that they were somehow negligent or somehow they should have and didn't, which, although even if the argument isn't directly made, it's through the examination, you

know, even if it's just at the end you say, you know, ladies and gentlemen, you know, I haven't been able to cover everything, so when you I go back to the jury room, I want you to think about all questions I've asked and things like that, and, you know, which is something that I imagine, it may be said on summation and may be also, you know, both sides may say, you know, ask the jury to basically think about all of the evidence and think about -- so I guess my -- I guess what I'm saying is that it may -- the issue -- it may not just be the ultimate decision is about what is argued to the jury but what information has come out --

MR. DONALDSON: So, Judge, I'd like to --

MR. RICCO: Your Honor, can we have a moment, please?

THE COURT: Yes. Go ahead.

(Counsel confer)

MR. DONALDSON: Judge, I -- Sorry, Judge.

THE COURT: That's okay.

MR. DONALDSON: Judge, I'm sorry.

THE COURT: Yes.

MR. DONALDSON: I'm looking at my little notes here, what do I have, to see what I have.

We are not arguing that the victim's negligence, failure to discover fraud, makes him not guilty. That's not what we're arguing. We are not arguing that their lack of due diligence was the cause of the fraud. I don't know if you were

saying that, but that's what I have here. That's not what we're arguing, and -- but the questions that you just raised as hypotheticals, strange enough, are directly related to what -- what the government said related to one of the witnesses in their background check and the applications related to the WNBA and things like that. So, let's say, for example, hypothetically speaking, let's just say, hypothetically speaking, so everybody gets a good grasp of the facts here, just hypothetically speaking they bring in Mr. D.C., Mr. Dershowitz, who says something about that, we do a background check of all persons who are going to want to purchase in NBA, who want to purchase a team for the WNBA because our board of governors have to approve etc., etc., etc., so we have to do a background check. Using the Court's hypothetical, I would be somehow constrained or refrained from asking questions directly related to something that they ask in direct, which I'm sure I can't be restrained from doing. So, I'm not -- my -- any questions that I may or may not have related to the -- I don't want to use the phrase "due diligence" but the background or what they did related to the -- to the fraud is not again to -- and I think this is appropriate, as they would argue knowledge is intent is for a particular purpose, my questions related to my cross-examination is for a particular purpose and that has nothing to do with what I said earlier what my conclusion will

be, and my -- again, my anticipation of this argument by the government is that we're not arguing that their fraudulent conduct played a role -- we are arguing that some of their fraudulent conduct played a role in their credibility in the jurors' ability to determine their credibility. So if my background questions relate to whether or not their conduct was within itself fraudulent or their intent was somehow motivated by fraud, of course, that must be relevant because it goes to their credibility as witnesses, but has nothing to do with whether or not it's -- their negligence is the cause of the fraud. That's not the purpose of the question.

THE COURT: I'm not sure exactly -- whatever your defense is going to be, and to the extent -- I'm not sure if you were suggesting that some of the witnesses, you believe, were engaging in some fraud of their own, and I don't know that, but what I will say is with, regard to cross-examination -- I mean, it's not -- it's not a question -- I mean, there are ways to deal with this issue, if there's even -- whether there's agreement or not. If something is not a defense, the jury can be instructed that, you know, the witness' negligence and the lack of diligence and the like is not a defense to fraud, something like that. And so, you know, the limitation of the questioning you ask may raise the specter in the jury's mind or maybe negligence has something to do, well we can disabuse them of that through instructions at the

time of the testimony in particular but certainly in the instructions that they're provided, you know, at the end. If what you're saying is the questions that will be asked in this regard go to a different argument that you're going to make, all right, well, I mean, I obviously need to see that, and if the argument is -- it's hard to know what the questions are until they're asked, but there is a way to deal with it, if they're not legally -- if the jury can't legally consider a victim's negligence and the like. You know, they can be told that's not an issue, and even told that, you know --

Well, again, I don't know what the cross-examination is going to be but and whether --

But let me ask, so do you agree that in terms of -- in making a defense that because you -- as I heard you say that you're not going to argue that the negligence -- because in essence the negligence and the lack of due diligence is not a defense for fraud.

MR. DONALDSON: Yes, Judge. I'm pretty clear what the Second Circuit law is not that. It's not a civil case. We're not arguing dirty hands and things like. That's not what we're here for. So, I'm pretty clear on that. The short answer, yes.

THE COURT: All right. Okay.

So let me ask you, Mr. Mead, is there anything else from the government, with regard to these last two negligence

issues and the prior good acts and the like?

MR. MEAD: I mean, I'm a little unclear on where we've left things. Your Honor, you know Mr. Dershowitz is the GC of the WNBA. He did do some sort of background investigation. I think that's a perfectly appropriate topic generally for the defense to inquire about. I mean, what I'm worried about, you know, more Dwight Howard, our primary victim, gets up and testifies and there's cross-examination about you didn't even google this guy, you didn't talk to these people, you didn't, you know, consult with someone where sending $7 million. That's the line of cross-examination I'm worried about. I think it's plainly inadmissible. I think that a judicial instruction to disregard that defense is quite helpful, but, obviously, it's better to keep the cat in the bag if we can do that.

THE COURT: Yes. I mean I guess the issue though is, Mr. Mead, I understand what you're saying, I just don't know -- A, I don't know what the cross-examination is going to be and so, what I -- I do have my decision but what I would suggest is that we come loaded with curative instructions with regard to these type of issues and the questions that you're concerned about and also that we consider those issues as we look at the jury charge of things to, in essence, to take off the table because there may be certain -- cross-examination may, yes, go to negligence, yes, go to, you know, their -- how could you

not -- I mean if you google his name, it's going to come up that he was involved in fraud or whatever. I mean, look, I don't think that's going to be a question, but there are certain questions that could be utilized in different ways. And so, even if the defense doesn't make the negligence argument as Mr. Donaldson has indicated that they won't or the due diligence argument.

So I take there's nothing else. I'm going to sort of give the parties sort of my decision on the issues that are currently outstanding with regard to the outstanding motions:

First, with regard to the defendant's motion *in limine* to preclude the testimony victim of individual 1, so in light of the government's representation that it does not intend to call individual 1 to testify in its case in chief, defendant's motion to preclude this testimony is moot. However, the government has reserved, and it mentioned here today also its right to call individual 1 in its rebuttal case if defendant suggests that individual 1 was, in some way responsible for the fraud. Although I am not asking defendant to commit at this time to any particular defense, I do not foreclose the possibility of the defense opening the door to testimony from individual 1 or others concerning individual 1's involvement or lack of involvement in the charged fraud schemes. I note that an argument that individual 1 was either involved in the fraud or benignly participated in some way does not negate

defendant's involvement in defrauding the victims. At some point closer to the time the government rests its case, I'm going to ask the defendant whether -- whether he intends to argue that individual 1 is in some way responsible for any fraud schemes or was involved in the charged frauds in some way, and maybe, based upon the arguments I heard today, there may be testimony about individual 1 speaking with some of the victims or somehow being involved in some way.

If the government speaks to call individual 1 or to otherwise introduce any statements of individual 1 made during interviews with the government in any rebuttal case or as indicated here if the government changes its mind and wishes to have that evidence offered in its direct case, I'll hear the parties with regard to their respective positions. That includes a hearing, whether there's a hearing that should be necessary that should be necessarily with regard to individual one's competency, and, obviously, that would occur prior to any testimony I would hear -- any testimony the jury would hear from individual 1 should the government seek to elicit his testimony. And with regard to the admissibility of individual 1's statement to the government, the government would need to establish why that statement is admissible under the Rules of Evidence. So that's a bridge we don't need to cross it right now but I put that out there so that we can move quickly through that issue, if it comes up in the government's

direct case or any rebuttal the government might request.

Now with regard to the government's other motions *in limine*. First, the government moves to admit evidence related to the defendant's three prior frauds pursuant to Rule 404(b). Second, the government moves to preclude certain defense arguments as irrelevant. Third, the government moves to preclude cross-examination of athlete 1 regarding a text message that he sent to codefendant Darryl Cohen following Cohen's arrest.

First, with regard to prior frauds, the government seeks to offer evidence of the following three prior criminal schemes that defendant participated in and pled guilty to on January 16, 2015: One, a fraud in which defendant deceived a lender into loaning money to purportedly organize a professional boxing match that never came to pass; two, a fraud in which the defendant deceived a lender into loaning money purported to organize an NBA exhibition game that never came to pass; and, three, a fraud in which defendant obtained investments from victims under fraudulent pretenses purportedly for the purpose of purchasing Maxim Magazine. The government proffers that this evidence is admissible both as direct evidence of the instant charged conduct and because it is probative of the defendant's intent, knowledge, plan, modus operandi, and the absence of mistake pursuant to Federal Rule of Evidence 404(b). Defendant argues that this evidence should

be precluded because there is no similarity between the prior frauds and the instant charged conduct and because of the risk that the jury may improper infer from this conduct that defendant has a propensity to commit crimes and thereby infer that he committed the instant offenses. In addition, defendant argues that this evidence should also be precluded under Rule of evidence 609(b) because defendant's conviction is more than ten years old and is, therefore, presumptively inadmissible.

Having considered the parties' arguments, although I am inclined to admit this evidence, I do not make the ruling at this time but will wait to see if defendant explicitly disavows knowledge and intent as a defense and proceeds to cross-examination witnesses consistent with such a disavowal as I understand that seems highly unlikely at this stage, but I'm still going to reserve decision for now.

Here are the basis of my ruling, with regard to Federal Rule of Evidence 609(b): So, as an initial matter, defendant's argument that his conviction is inadmissible under Rule 609(b) entirely misplaced, Rule 609 provides that if a defendant in a criminal case testifies, his or her "character for truthfulness "may be impeached by evidence of a criminal conviction under certain conditions. The government has not moved to admit the fact of defendant's prior conviction as impeachment evidence, rather it moved solely pursuant to Rule 404(b) to admit the evidence related to defendant's prior

conduct in its case in chief. It is worth noting, however, that even if Rule 609 governed the admissibility of such evidence, defendant's argument for preclusion is factually and legally incorrect. The more stringent balancing test required under Federal Rule of Evidence 609(b) only applies "if more than ten years have passed since conviction or release from confinement, whichever is later. The ten-year period is calculated from the start -- from the start of the trial, which here, will be September 23rd, and I'm citing *United States v. Weichert*, 783 F.2d 23, 26, as well as *United States v. Pedroza*, 750 F.2d 187, 187 at 203.

Thus, regardless of whether defendant's November 4, 2014, conviction, which is when I understand Mr. Darden pled guilty initially to two fraud schemes, or January 16, 2015, serve as the controlling date, both convictions are just under ten years old. Therefore, Rule 609(b) does not provide grounds for exclusion. Moreover, Rule 609 clearly states that it only applies if more than ten years have passed since the witness' conviction or release from confinement forward, whichever is later. Thus, even if the conviction itself occurred more than ten years ago, defendant was released from confinement on August 29, 2017, just over eight years ago. In addition, should the defendant elect to testify at trial, the government will likely be permitted to cross-examine defendant concerning the conviction

pursuant to 609(a). Prior convictions involving crimes of dishonesty or false representations are automatically admissible under 609(a)(2) as they bear on a witness's propensity to testify truthfully. And there I'm citing the *United States v. Estrada*, 430 F.3d 606, 615. In one of the essential elements as they bear on propensity on truthfulness and one of the essential elements of wire fraud is "obtaining money or property by means or false or fraudulent pretenses, representations, or promises," and that's a direct quote from the statute itself. However, I will hold my decision in abeyance until such time as defendant indicates he's going to take the stand, and the government indicates its intention to impeach him on his prior convictions. Now, with regard to Rule 404(b), I find that the evidence of defendant's prior conduct is likely admissible for several purposes pursuant to Rule 404(b) and that the probative value of this evidence is not outweighed by the risk of undue prejudice. Under Rule 404(b) "evidence of a crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." However, such evidence, "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of evidence -- lack of accident", and citing there 404(b)(2).

In deciding whether to admit 404(b) evidence, district

courts must ensure that the evidence is, "One, advance for a proper purpose; two, relevant to the crime for which the defendant is on trial; three, more probative than prejudicial; and; four, if requested, admitted with a limiting instruction to the jury." and I'm citing *United States v. Agudelo*, 141 Fed. App'x 13, 15.

As the government notes, the Second Circuit has adopted an inclusionary approach to admitting evidence of other crimes, wrongs, or acts under 404(b) for any purposes other than to show a defendant's criminal propensity. And I'm citing *United States v. LaFlam*, 369 F.3d 153, 156. Under this approach, "all other act evidence that does not serve the sole purpose of showing the defendant's bad character and that is neither overly prejudicial under Rule 403 nor irrelevant under Rule 402" should be admitted. And I'm citing *United States v. Ahaiwe*, which is at 2023 WL 4196954 at *3.

Evidence of defendant's prior conduct is probative of defendant's knowledge or intent. In his opposition largely sidesteps the government's argument that evidence of defendant's role in each of the three schemes is knowledge and intent instead relying on the argument that the prior conduct is "not remotely"connected in the instant action due to the "differences in context and circumstances." Defendant's argument does not address the issue of his knowledge and intent. As an initial matter, it appears that defendant

intends to argue that he did not act with the requisite intent to commit the charged crimes, thereby placing knowledge and intent squarely at issue. In fact, defendant states that "he is innocent of the alleged crimes in the instant action and that he did not commit the crime -- did not commit the offenses as charged in the superseding indictment." That's in the opposition brief at 8. To take knowledge and intent out of the case, "A defendant must make some statement to the Court sufficient -- of sufficient clarity to indicate that the issue will not be disputed." I'm citing *United States v. Pitre* there, that's P-I-T-R-E, 960 F.2d, 1112, 1119, "A defendant may do so either by putting forward a particular theory of defense or specifically offering to stipulate." And I'm citing *United States v. Ozsusamlar*, 428 F. Supp. 2d 161, 168. Here, defendant has not stated or suggested that he disavows knowledge or intent as a defense. In this circuit "Where a defendant claims that his conduct has an innocent explanation, prior act evidence is generally admissible to prove that the defendant acted with the state of mind necessary to commit the offense charged." And I'm citing *United States v. Zackson*, 12 F3d. 1178, 1182. In addition and contrary to defendant's suggestion otherwise, when intent is in dispute, prior act evidence is admissible during the government's case in chief, and I'm citing *Pitre* again there, at 1120.

Moreover, prior act evidence particularly probative of

knowledge and intent in the context of crimes of fraud, and I'm citing the *United States v. Illori* there, which is 2022 WL 2452258 at *6. Here, the prior conduct is sufficiently similar to the charged conduct to warrant its admission as the defendant himself acknowledges defendant impersonated and leveraged the success of individual 1 in order to defraud and deceive the victims in each of the prior schemes -- excuse me prior -- yes, in each the prior schemes, conduct which the government also alleges the defendant engaged in here. In addition, at least two of the previous schemes involved professional sports. It involved the use of false pretenses or representation to commit the prior frauds, facts of which are also relevant to the charged conduct. Thus, this evidence is probative of knowledge and intent. In addition, and for the same reasons, defendant's prior conduct is also relevant to show absence of mistake.

I also find that defendant's argument that he will be unfairly prejudiced by the admission of this evidence unpersuasive. The evidence related to the defendant's prior conduct does not involve conduct that is any more sensational or inflammatory than the charged conduct. And I'm citing *United States v. Livoti*, 196 F. 3d 322, 326. Neither of defendant's cases cited cases are persuasive. In *United States v. Narzikulov*, N-A-R-Z-I-K-U-L-O-V, which is a 2021 WL 2255486 at *2, the Court reserved ruling on the admissibility of the

defendant's plea allocution in a prior criminal case which involved "nearly identical facts" to the charged conduct, thus increasing the risk of potential prejudice. In addition, the defendant relies on *United States v. Carneglia*, which is somewhat puzzling. There, the Court granted the defendant the government's motion *in limine* to preclude the defendant from eliciting evidence that murders of two individuals the defendant was charged with committing were previously charged against other individuals. That is plainly not the issue here, nor is the Court's ruling at all relevant to the government's motion. In addition, any risk that the jury may infer propensity can be further mitigated by my issuing a curative instruction. Thus, the probative value of such evidence is not substantially outweighed by the danger of unfair prejudice. However, I will not make a final ruling with regard to this evidence but will wait to see if defendant explicitly disavows knowledge and intent as a defense and proceeds to open and cross-examine witnesses consistent with such disavowing. Again, it appears that that is unlikely to occur, but the defense is free to make whatever arguments on opening and whatever examination it wishes to do on cross-examination. Understanding that the evidence will likely come in, if knowledge and intent and absence and mistake are still issues that are in this case.

Two, with regard to the defense, preclusion of defense

arguments: First, with regard to the negligence of the victims, the government also moves to preclude defendant from arguing that athlete 1 and athlete 2 acting negligently or were gullible. In opposition, defendant argues both that the government's motion is premature because he has not indicated that he intends to make such an argument and that it should, nonetheless, be denied because whether the testimony victims acted negligently is a question for the jury. And here again, we had some arguments which appeared to indicate that some of the questioning may actually go to something other than the victim's negligence and in connection with their due diligence and the like. Now, I agree with the government that evidence of or arguments regarding the negligence evidence of athlete 1 and athlete 2 is likely irrelevant. The law in this circuit is clear that because "Reliance is not an element of criminal fraud" and because "the unreasonableness of a fraud victim in relying or not on a misrepresentation does not bear on a defendant's criminal intent." "Defendant's facing wire fraud charges may not assert a "gullible victim defense." I'm citing *United States v. Weaver*, 860 F.3d 90, 96. Defendant has not raised any compelling arguments or authority that would persuade me to depart from this authority. Indeed, defendant fails to acknowledge the cases cited by the government, nor does the defendant address the threshold relevancy question. Instead, the defendant avers that Courts have "often held" that

whether a victim acted negligently is a question to be decided by a jury. This argument misses the mark entirely. The question raised by the government's motion is not who should weigh the credibility of witnesses, but rather whether the state of mind of athlete 1 and athlete 2 is relevant at all. In addition, defendants cited authority is wholly inapposite. Defendant cited *Cruz v. United Auto Workers Union Loc. 2300*, which is at 2019 WL 3239843 at *3, an out-of-district, civil wrongful-death action. There, unlike here, whether plaintiff was negligent was relevant to the elements of certain claims, and the Court found that the plaintiff's negligence was, therefore, a question for the jury. The Court did not hold, contrary to defendant's suggestion otherwise, that the negligence of fraud -- that the negligence of fraud victims is a relevant question for a jury in a criminal case. Although defendant will likely not be permitted to argue or introduce any evidence suggesting that athlete 1 or athlete 2 were negligent, I will hold my final ruling in abeyance pending the specific arguments and questions asked at trial. In addition, I will consider giving a curative instruction, as I indicated here today, both after the testimony in question, should it be raised by the government, as implicating certain negligence or blame-the-victim defenses and a specific charge to the jury making it clear that the victim's negligence is not a defense to fraud or money-laundering charges.

Now, with regard to a prior good acts and potential punishment, the government also moves to preclude the government from introducing any evidence of any "good acts" to disprove his guilt as well as any evidence or arguments regarding his family background, health, age, pretrial detention, or any other similar factors. Although I agree with the government that such evidence is unlikely to have any probative value, I will hold my ruling on this motion in abeyance at trial to see what exactly the evidence may be with regard to that. Of course, there are certain limited circumstances under the Rules of Evidence when certain character -- whether a defendant could call character witnesses. I'm not at all saying that that's something that's going to occur here. I'm not saying that certain questions may go to the defendant's character on cross-examination. However, I believe I need to wait to hear exactly what the evidence will be.

Now, with regard to the Cohen jail texts, the government also moved to preclude the defendant from introducing a text message sent by athlete 1 to codefendant Darryl Cohen as irrelevant and unfairly prejudicial pursuant to Rules 402 and 403. Defendants suggest that it should be permitted to cross-examine athlete 1 regarding this text message in order to provide the jury with "full understanding of the dynamics between athlete 1 and Cohen and to challenge

any potential bias or motives that could impact the integrity of the testimony.

My understanding, am I correct that athlete 1 is the individual who the government has indicated they will not be calling to testify?

MR. MEAD: That's correct, your Honor.

THE COURT: All right. So, first, however, besides referring generally to unspecified context, the defendant fails to explain why the dynamics between athlete 1 and Cohen, including any bias or ill will that athlete 1 may have had toward Cohen are relevant to any fact or issue in this trial. Indeed, as the government points out, athlete 1 was the victim of two entirely separate frauds committed by different individuals, and defendant does not -- does not identify any overlap between the schemes or participants, nor did defendant object to the severance of defendant's trial for Cohen's trial? In addition to lacking probative value, permitting defendant to cross examine athlete 1 regarding this text would cause confusion, mislead the jury, be a waste of time, and be unfairly prejudicial. Therefore, defendant is precluded from introducing this text message or cross-examining athlete 1 about its contents.

I also rule that since athlete 1 will not be testifying, that this motion is largely moot because there will be no -- I cannot conceive of a way that text message comes in

at this stage, both how a foundation would be laid or otherwise, but in any event, I just don't see how that text message about a different defendant impacts the defendant here or shows some bias towards the defendant here. And the defendant hasn't established that connection for me.

Now, I think I received -- so as I understand it, the government has provided the list of exhibits or the exhibits themselves and 3500 material to the defense. So I don't think there's anything to be said with regard to that. And so I do expect to get those materials at some point later today.

Okay. So those are my rulings. Are there any questions with regard to that? Mr. Mead?

MR. MEAD: Just one question on the 404(b) ruling, your Honor.

THE COURT: Yes.

MR. MEAD: We're not going to introduce, kind of, like, the transcript of his previous conviction at the beginning of the case obviously.

THE COURT: Or open on it.

MR. MEAD: Right. We're not planning to open on it. We do think that our early witnesses may mention his conviction as kind of a part of their story.

THE COURT: Well, just provide -- I think you need to sing a few more notes.

MR. MEAD: Sure. Sure.

THE COURT: In other words, how -- is it something that they became aware of -- in other words, what's the context that it would be raised in? And, in addition, so I have the quotes from the prior testimony, I take it that is -- that doesn't necessarily encompass all of the evidence the government would seek to admit in its direct case relating to the prior conviction. So I would want to know, and it maybe it will become obvious when I see the exhibits, but will the government be offering, for example, a defendant's plea allocution on January 15 -- or January 2015 in addition to the testimony or other things?

MR. MEAD: So, right now our thought is to proving up the prior convictions and the facts of that, is we've marked his trial transcripts, which the Court has seen.

THE COURT: Yes.

MR. MEAD: And then I think is the judgment from the S.D.N.Y. case. I'm not expecting that we'll be adding anything else.

THE COURT: Okay.

MR. MEAD: We may find something.

Circling back to the Court's first question, John Brock is going object to be our first witness. We had expected to ask him if he was aware of the defendant's previous conviction, and expect him to say, yes, that he was aware in part because some people in the case were aware of it and some

people were not aware of it, and that obviously can be kind of significant in determining -- so, for example, if Mr. -- because they were aware of it, they knew that it might be a problem in terms of buying the WNBA team, and that's a part of the story about how the fraud works. You know, I think --

THE COURT: So, wait a minute. I apologize. Mr. Brock is?

MR. MEAD: Sorry, yes, your Honor. Mr. Brock, essentially on the Atlanta Dream side, he's in charge of selling the team.

THE COURT: Okay. So this is the witness though where I was kind of playing, sort of sanitizing it --

MR. DONALDSON: Actually, no. No. That's not the witness.

THE COURT: So this is --

MR. DONALDSON: That's not the same witness.

THE COURT: Well, I guess the question is, Mr. Mead, to cut to where I think you were going, are you going to be allowed to ask -- is he going to be allowed to testify about his knowledge of the prior conviction?

MR. MEAD: Yes, your Honor. And my thinking is, it seems extremely unlikely that the defense will, in fact, disclaim knowledge and intent. So the sanitization, it was --

MR. DONALDSON: I'm sorry.

MR. MEAD: I'm sorry.

MR. DONALDSON: I didn't hear that last part.

MR. MEAD: It sounds extremely unlikely that the defense will disclaim knowledge and intent such that kind of the sanitization of that testimony, if we do it, will be kind of confusing and pointless. Obviously, if even on, like, Sunday night, they email us and say, we are affirmatively disclaiming knowledge and intent, we can adjust for the Mr. Brock's testimony on Monday morning, but I think it's hard to say and let the defense decide mid-trial when we've got witnesses who are going to bring it up.

THE COURT: What I would say is, I think that there is a time limitation on this, and I would imagine that, you know, unless there's no opening, because the defense doesn't have to open, that the issue will be, you know -- I will know by that time, and therefore, be able to make a ruling with regard to Mr. Brock if, in fact, I don't have a clear understanding because the opening doesn't -- either because there isn't an opening or because it doesn't -- well, I mean, again, it would have to be explicit, it has to be clear. Typically, in cases it's either a stipulation or otherwise, but I think it's likely I'll be able to make that call before Mr. Brock testifies.

MR. MEAD: Then, your Honor, we have kind of a little bit of a grab bag of other stuff that's not related to the filed motions. I don't know if you want to give the defense a chance.

THE COURT: Yes. So, Mr. Donaldson, with regard to the issue of the -- I take the government's first witness, Mr. Brock, who I guess will testify that he did become aware somehow that Mr. Darden had a previous felony conviction, one or more, I don't know exactly what the details are, do you have any comments about what the government has said? I mean, if knowledge and intent hasn't been taken off the table, you know, based upon my ruling, putting aside the MO issue, I think knowledge, intent, absent of mistake will be at issue, and I would be inclined to allow Mr. Brock to basically -- and, again, I don't know the context. That -- it sounds as if would be similar to what was proffered that he was aware of the prior conviction and that would present a problem for a potential owner or someone to have an ownership interest, though not entirely preclusive, it would present a problem, and as I understand that, that is testimony offered to explain why on some documents Mr. Darden's name doesn't appear.

MR. DONALDSON: Yes. I think we are of the position that -- first, I think the government's statement related to Mr. Brock's testimony and it's somehow that part of the testimony being part of the story, let's say, from a defense perspective we understand that, there is a way though that we think that that type of information can be elicited from the government without using the words "felony," etc. So we may be able to come to some type of agreement, myself and the

government, related to what that information would be, so that we can move forward in enough time so the Court can address that. So I think that we would like to -- I think that we can talk to the government about how to sanitize that so that it's appropriately elicited and then we can move forward from there.

THE COURT: Okay. So I guess what I would say with regard to that, that's fine, the parties can talk about that, but I am not sure it entirely eliminates the issue of the felonies coming in, at some other point in time. In other words, the knowledge and intent is still an issue. And so, you know, and so -- it might be sanitized with regard to Mr. Brock, but maybe not with regard to others. So I might need to basically say, not only can't they speculate about why Mr. Brock -- you know, whatever the issue may be that had an impact on the purchase of the team, that -- I just don't want the jury to start -- so I understand what you're saying, but it doesn't necessarily eliminate the felony issue overall in the case because, as I indicated, unless knowledge, intent, or absent of mistake are taken off the table, it's still -- it's still evidence that I'm going to allow in. You know, what -- what the -- what that consists of, whether, obviously -- I'll make specific evidentiary rulings on the exhibits as the government presents them, including sort of the testimony and then whatever -- I guess it's the judgments of conviction, but it's likely -- it's likely to come in. I mean, it's highly

likely to come in based upon the arguments I've heard today.

I guess -- I guess what I'm saying, Mr. Donaldson, you can still talk about the government about it, and it's up to you, but I'm not sure, you know --

MR. DONALDSON: Judge, you know, I personally think that I want to get to the meat and heart of it as quickly as possible and get this issue resolved. So I am probably going to send something to the Court related to this issue conclusively, probably within 24 hours. I completely understand that, you know, Brock or -- and I think they're confusing witnesses a little bit, but Brock doing his part about testifying about what he heard or knew whatever and Dershowitz during his testimony about the application and what was in the application, things like that, and then the Court having to decide whether or not -- not decide, but issue a ruling on 404(b), depending on knowledge and intent, which the Court is may be correct is likely coming in anyway. So if that's the case, then all of this first part is probably moot, and I want to reach that as quickly as possible.

THE COURT: Okay.

MR. DONALDSON: So I'm probably going to send something to the Court in a reasonable amount of time so that we can address that and clear that up.

THE COURT: All right. Okay. No. That's fine.

And there may be some back and forth. Because I've

had cases where some back and forth about, I mean, is that sufficient, I mean, is it sufficient to take it off the table, is it not.

So, that's fine, Mr. Donaldson. And we can -- we can talk about that, perhaps on Tuesday, if I have the information and the parties' relative positions. So I'll take a look at that, you know, and you should look at, you know, what other Courts have found to be sufficient, to literally take that off the table. And it's understanding, even if -- I don't know how the trial is going to progress. So it could be that something is -- I'm in no way precluding the defense from, you know, pivoting and deciding, do you know what, no, we're going to throw this in, we're going to have it -- so I understand that -- and so even by, Mr. Donaldson, you making a -- taking it off the table, you still have the opportunity -- I mean, it still could come in, if you change -- if you sort of change your examination and such, that I feel it opens the door, the stuff still may come in, just to -- in the interest of letting everybody know where that stands.

MR. DONALDSON: All right.

THE COURT: Because it's not just -- I apologize. It should be more clear. So it's not just a stipulation that gets put in, it's what actually happens in front of the jury.

MR. DONALDSON: Right.

THE COURT: And so it's got to be, you know, the two

have to be consistent, both in terms of opening and cross-examination, and then summation.

All right. Mr. Mead, you said there were some other things? Go ahead.

MR. MEAD: First off, your Honor, we superseded against the defendant in July. This is the first appearance. He needs to be arraigned.

THE COURT: Okay. All right.

Let me ask: Mr. Darden, have you received a copy of the superseding indictment?

THE DEFENDANT: Yes, your Honor.

THE COURT: And have you had an opportunity to read it?

THE DEFENDANT: Yes, I have.

THE COURT: And do you waive its public reading or do you wish me to read it to you?

THE DEFENDANT: I waive it, your Honor.

THE COURT: All right. And have you had time to speak with your attorneys about that superseding indictment?

THE DEFENDANT: I have, your Honor.

THE COURT: Okay. How do you plead?

THE DEFENDANT: Not guilty.

THE COURT: Okay. All right. Thank you.

Mr. Mead.

MR. MEAD: Another issue is that the defense case,

your Honor, we have not received a witness list, Rule 26.2 material, Rule 16 material. Obviously if the defense isn't planning on putting on a case or is only planning on calling Mr. Darden, that's fine. The defense represented about a month ago that they expected to have a three-day defense case. I have some understanding that that was kind of a conservative in the sense of that was the outer-most bounds of defense case, it would likely be shorter. We're now very close to trial obviously. If there are people the defense is seriously considering calling, we should get a witness list and we should get Rule 26.2 statements from them and then we should be getting exhibits. I would just ask that the defense be instructed to do that.

THE COURT: Okay. All right.

Well, let me hear from Mr. Donaldson with regard to that. And, obviously, some of this may -- well, let me hear from you, Mr. Donaldson.

MR. DONALDSON: We will get the government a witness list as soon as possible.

And there is no way that our defense case will last three days.

THE COURT: Okay.

MR. DONALDSON: There is no way, if we had a defense case, it will last three days.

THE COURT: Okay. And with regard to timing, on the

list of witnesses, what is the estimate with regard to when you would provide the list to the government?

MR. DONALDSON: Within 24 hours.

THE COURT: Okay. All right. And so there may be some back and forth? If I could get, if possible, Mr. Donaldson, if I could be copied on that correspondence?

MR. DONALDSON: Absolutely.

THE COURT: Okay. All right. Thank you.

And with regard to exhibits, you know, are there any exhibits you anticipate, in other words, that you could -- or not with regard to those three witnesses.

MR. DONALDSON: Not yet, but as far as an exhibit list, I think we can have -- we may have something to the government in short order as well, but that wouldn't be 24 hours.

THE COURT: Both in 24 hours?

MR. DONALDSON: No. We're still working on that, but the witness list, I could get you that rather quickly. The exhibit list, I'm still tinkering with that one.

THE COURT: We can discuss that. I mean, obviously, any defense case is a ways off.

Mr. Mead, anything else?

MR. MEAD: A couple more, your Honor. One is the defense has said at some point that they were considering recalling some of our witnesses in their defense case. Almost

all of our witnesses are traveling from somewhere else. It would be highly burdensome. They're going to get a shot at cross-examination. I'm not sure if the defense is still thinking about that. I can imagine, kind of, truly extenuating circumstances that would allow them to recall a witness, but I don't think they should go in with the plan of recalling our witnesses because it's going to drag out the trial and be very burdensome.

MR. RICCO: Judge, we have no such intention. That is not an accurate representation of what was said. We recognize witness travel, etc., etc. That was told explicitly to the government when Mr. Mead raised this in a conversation that we previously had.

THE COURT: Okay. So I understand that absent anything unusual that the examination for witnesses will be done once and, obviously, you know, if something comes up, there may be an issue with regard to a witness and we can deal with that, but I'll -- I'll anticipate that once a witness is done, they're done, absent, you know, coming back for rebuttal or absent a specific reason why the defense is going to call the witness in their case.

MR. RICCO: That's correct, Judge. And that's how our understanding, and that's what was expressed to the government.

THE COURT: All right. Thank you.

Yes, Mr. Mead.

MR. MEAD: In terms of timing, I still think it makes sense to tell the jury two and a half weeks. For the Court, I think we're optimistic we're going to be done maybe substantially faster than that.

THE COURT: Okay.

MR. MEAD: I think the government's case is very likely to be done by the second week, maybe even midway through the second week, not a promise, but just to the Court is thinking that through.

THE COURT: Okay.

MR. MEAD: In terms of scheduling, we have a lot of witnesses coming in from all over the country. I think we're going to be fine in terms of having people on tap. There may be a day where we say, Judge, it's 4:40 or something, and could we end early, and hope the Court is okay. We'll absolutely do our best, believe me.

THE COURT: So this is -- you know, the last trial I did when I was a prosecutor was in front of a judge, and we were -- we were ending at 5:30, and it was like 5:25. And I said, you know, Judge, you know, we were out of witnesses and we had gone through a bunch of witnesses that day, and I won't disclose who it was, but shakes her head and goes, well, all right, but just this one time. So I just -- I would say, Mr. Mead, I understand that there may be issues and witnesses may move more quickly than others. You know, what I would

suggest, and I don't know whether this -- I don't know whether they're going to be government witnesses, like phone records, things, like, that you have somebody in the hopper who, you know, can be -- that designated witness basically to call in, but I understand that, you know, sometimes things move more quickly, and because of witnesses' scheduling, but as much notice as possible that I get so that we can -- A, the defense can find out, but more critically, the jury knows when we're going to need them and the timing so we can let them know as quickly as we can, that, oh, we're going to end at 4, we may end early today, things like that.

MR. MEAD: Absolutely, your Honor.

THE COURT: Obviously, I mean, you know, a little bit of time, but if it's half, yeah.

MR. MEAD: We're certainly not expecting that, I. Think we're going to be totally fine. I just wanted to flag that for the Court.

THE COURT: Also understanding that things do happen, you know, especially, you know, now it's more likely storms and people coming in from different -- especially if they're cutting it like close in terms of, you know, trying to come in the day before and then the next thing you know their flights are cancelled. Just, as I said, Mr. Mead, as much notice as possible with regard to the timing issues.

MR. MEAD: Next up, Dwight Howard, our primary victim

and maybe the most significant witness in the case is going to be a contestant on the network television show, Dancing with the Stars during the time of the trial. So he'll be on network television kind of in the evening of the trial.

THE COURT: Okay.

MR. MEAD: I don't think there's anything for the Court to do about that. We've got a voir dire question asking if people watch it. I just -- it's a weird enough issue that I just wanted to alert the Court.

THE COURT: Yes. And I had not been following that. I think my law clerk was more up to speed on that than I was, you know, because -- I almost put in the comments, like, why, Dancing with the Stars, why not, you know, The Masked Singer, not realizing that there was a specific witness was going to be on Dancing with the Stars. I'm not sure there's anything to do with regard to that. I mean, can I tell the jury -- well, think about whether I can -- obviously, they're not going to discuss the case. The parties should meet and confer and decide whether I tell the jury they can't watch Dancing with the Stars or that they can. I don't know whether -- I can instruct them that, you know, whether or not Mr. Howard and how well he dances has nothing to do with the case here. But what I would say is, think about that and the implications of that because there may be people who watch it and maybe no one does, but they are going to see a witness, it's a little unusual,

they're going to see a witness or television. So even though the witness isn't going to say anything about it, whether and what instructions I should give in connection with that.

MR. MEAD: That makes sense, your Honor.

A couple more things, as to one of our witnesses, we have some topics of potential cross-examination that we think are both inappropriate and highly confidential that is separate from the letter we sent the Court today --

THE COURT: Okay.

MR. MEAD: -- to a different witness? We've spoken about that with the defense. The defense informed us today that they are going to try and cross-examine on those subjects. I think we'll likely submit another sealed letter to the Court about that at quickly as possible.

THE COURT: All right.

MR. MEAD: We sent the defense, just to provide the Court notice, we sent the defense a letter informing them that if the defendant testified, we did plan to ask about his previous convictions. There's the convictions the Court has already talked about. There's a separate conviction from, I think 2005. We provided them notice under Rule 609(b). It's a fraud conviction. We did intend to ask about it. I'm sure the defense disagrees. I don't think the Court needs to deal with it now. We have no idea if the defendant is going to testify.

THE COURT: Okay.

MR. MEAD: We also informed the defense that the defendant gave a postarrest statement. The Court may have remembered there was a motion to suppress that statement. The government said it was not going to use that statement in its case. We included a footnote. The Second Circuit has said that cross-examination on such a postarrest statement is permissible. We just put the defense on notice that if he testifies, we fully intend to cross-examine him based on that postarrest statement. We've produced -- we informed the defense that we intend to introduce a lot of evidence based on Rule 902.11. I don't think the defense is a contesting that, but, obviously, if that issue percolates further, we'll inform the Court.

THE COURT: 902.11, just give me...

MR. MEAD: Sure. Sorry, your Honor. The little certification at the end of subpoenas saying this is a business record.

THE COURT: I see. Okay.

MR. MEAD: Yes. I think it's all -- I think it's all sufficient --

THE COURT: I mean I just -- because, obviously, if there are issues with regard to that, I would need to know, so if I can just confirm that it's not going to be an issue, just so I can make the ruling. And, obviously, you know, the certification is what it is, the rule says what it says, but,

you know, I would need to -- I would want to, A, know about the information, and, I think give the government as much notice as possible, if there's going to be an issue with regard to getting a witness here on that.

MR. MEAD: That makes sense, your Honor. I don't think there will be an issue, but we'll, of course, let the Court know.

THE COURT: Yes.

MR. MEAD: The defendant's, in terms of exhibits, the defendant's father shares the same name and has some involvement in the facts of this case.

THE COURT: Yes.

MR. MEAD: We expect to introduce, for example, bank opening statements and he'll need to kind of prove his bank account it was. Those bank account statements and other things like that will have PII on them, like Social Security numbers and dates of birth. Our view is that is relevant here, right, because it's a specific identifier, so you know Calvin Darden is the Calvin Darden on trial and not the other Calvin Darden. We are planning, we may file something. We're planning to kind of make those exhibits subject to some sort of protective order so that, like, the press can't get Social Security numbers. We have floated that to the defense, but I suspect they're okay with that as well.

THE COURT: I mean, I guess as the threshold question,

is there going to be a dispute with regard to, you know, bank accounts, phone records, things like that, that -- in other words, is that going to be something that's contested or does the government -- I mean, there's also another argument the government wants to affirmatively establish that this is the defendant's and there's no -- so the jury -- there's no speculation?

MR. MEAD: I think both the latter and I think also, you know, some of our evidence that the defendant was impersonating his, you know, his father with the same name is based on kind of, well, on this bank statements, you know, it's him, and he lists this phone number and that's phone number that's having these communications. So I think it's hard to get away from.

THE COURT: All right. That's fine.

MR. MEAD: We're in talks with some stipulations with the defense, we may work those out, but kind of the trial is shrinking in a helpful way. So I don't think we're going to have a big problem.

And then, finally, I don't know what the Court's typical practice is on allocution as to a plea offer, there is no active plea offer. The plea offers have expired. But just for the record, we did make two formal plea offers to the defense, and it is my understanding that the defendant chose to reject them.

THE COURT: Okay. All right. With regard to, let me just ask, with regard to that, to that issue, accepting that the plea offers have expired, I take it, Mr. Donaldson, you received --

Were they sent to Mr. Donaldson?

MR. MEAD: They were, your Honor.

THE COURT: All right. They were received, the plea offers; is that correct?

MR. DONALDSON: Yes, your Honor.

THE COURT: And without saying the substance of your communication with your client, those offers were -- your client was made aware of those offers, is that accurate?

MR. DONALDSON: Yes.

THE COURT: Okay. And that in connection with that, let me ask Mr. Mead, was there an explicit rejection or was -- did the time come and pass?

MR. MEAD: I'll let the defense counsel speak to that. My recollection was that there was an expiration date, and I was called on the expiration date by defense counsel and said that he was taking the deal.

THE COURT: Okay. All right. Mr. Donaldson, is that consistent with your recollection?

MR. DONALDSON: Yes.

THE COURT: Okay. All right. With regard to each of the -- were there two?

MR. MEAD: There were, your Honor. Yes.

THE COURT: With regard to each of the offers?

MR. DONALDSON: Yes.

THE COURT: Okay. All right.

All right. Anything else from the government?

MR. MEAD: No, your Honor.

THE COURT: Mr. Donaldson, anything from the defense?

MR. DONALDSON: No. Except we, regarding the exhibits, I know the Court wants the defense to provide hard copy exhibits as well, of our exhibits. I think that's correct?

THE COURT: That's correct. Look, let me just -- just to be clear with regard to your witness list and exhibit list, you don't have to do anything. Right? So the fact that I issued an order asking the government to provide me with their exhibits had nothing to do with what the defense is going to do. However, I've been informed today that the -- that the defense does -- there are witnesses the defense intends to call and there may be exhibits that they're going to offer, but I just want to be clear that I'm in no way -- even if the defense provides a list of witnesses or they don't have to call anyone. Right?

MR. DONALDSON: Okay.

THE COURT: You don't have to do anything. So with that -- with that understanding, yes, at some point,

Mr. Donaldson, if there are exhibits that you intend to show the witnesses you're going to call, that -- in other words, affirmatively to get in, in your case in chief, yes, I would like to see them. If there are documents you have that you're going to use for cross-examination, you can cross-examine them with anything, whatever you want, but, but, but be aware, that if I find during the -- that it's -- that the document needs to in evidence, you know, that's a separate issue that we'll have to deal with, with regard to laying a foundation and I'll rule on.

MR. DONALDSON: Of course.

THE COURT: And there may not be an objection. I mean the government may be fine with it. So to the extent there are going to be certain documents in particular, things that you've gotten in discovery that the government may not be object to being offered, if you can -- obviously, I don't -- as soon as you can, but at the latest after the government is done with a witness, if there are certain documents that you intend to offer through that, I'd ask you try and have a conversation so that -- so we're not doing too much stuff at sidebar or in a break.

MR. DONALDSON: Absolutely, Judge.

THE COURT: Anything else?

MR. DONALDSON: Not from the defense.

THE COURT: All right. No? Okay. Okay. All right.

Well, thank you everyone. Thank you for the arguments today.

Mr. Mead, you indicated there might be some additional motions *in limine*. What would be the timing on getting me something on those issues?

MR. MEAD: So I think it's just the potential cross-examination point, unless I'm forgetting something? Would Monday be okay for the Court?

THE COURT: That's fine. That's fine.

And then, Mr. Donaldson, any response by Wednesday?

MR. DONALDSON: That's fine, Judge. Thank you.

THE COURT: All right. Just so that I can get a ruling so that people -- and if you could, indicate whether or not either side -- whether opening statements, whether there's something that hinges on opening statements, that will give me a sense of when you need to -- obviously, I'm going to try and do it before we have openings, but just to be -- just to be sure.

And just so you know, my trial days, 10 o'clock to 5:30, a break in the morning, break in the afternoon, break in the morning, you know, will be 11:45 or so. We basically break for lunch at about 12:45, come back at 2. And as I said, in the evening -- I mean in the afternoon, you know, the jury will get an afternoon snack, and I'll try and do -- do the break at around 3, 3:30, 3:30, 3:45, or even 4, depending upon where things stand. So that they can have their break and have their

snack.

If there are issues that we want to -- that the parties wish to take up with me, I'd ask you let us know by 9 o'clock the night before so we can plan on being here at 9 or 9:30 so that we're not impinging on the jury's time and the time we have to hear testimony.

Okay. All right. So I will see everyone on Tuesday. 110.

And remember, tomorrow there is the electronic walk-through or whatever for each side, I guess in 110. I don't know what time, what time that's supposed to occur, but just so that everybody gets that done, but we're not familiar -- we, obviously, that's not our courtroom. So I think we're all going to be learning things at that time, but just to make sure everything works. All right. No one should do anything in a courtroom without first testing it out.

And, no relation, I don't think, to Christopher Darden, who, you know --

THE DEFENDANT: No relation.

THE COURT: -- who unfortunately, you know, didn't do that with regard to the gloves so...

All right. So I'll see everybody on Tuesday.

Thank you very much.

MR. MEAD: Thank you very much.

o0o